TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 295

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF NEW YORK, PETITIONER

vs.

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF JOHN B. JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1926
CERTIORARI GRANTED MARCH 22, 1926

(30896)

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INDEX

1 In United States District Court, Eastern District of New York

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, chattels, and credits which were of John B. Johnson, deceased, plaintiff

against

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES internal revenue for the first collection district of New York, defendant.

No. 173[illegible] Law

Writ of error

UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the judges of the District Court of the United States for the Eastern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Emma B. Johnson as administratrix of the goods, chattels, and credits of John B. Johnson, deceased, plaintiff, and Henry P. Keith, late collector of United States internal revenue of the First Collection District of the State of New York, defendant, a

2 manifest error hath happened, to the great damage of the said defendant, as is said and appears by the petition and complaint of the defendant, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 24th day of April, 1924, that the record and proceedings aforesaid being inspected, the said judges for the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, this 25th day of March, in the year of our Lord one thousand nine hundred and twenty-four and of the independence of the United States one hundred and forty-eighth.

PERCY G. B. GILKES,
Clerk of the District Court for the United States for the Eastern District of New York.

The foregoing writ is hereby allowed the 25th day of March, 1924.

MARCUS B. CAMPBELL,
United States Judge.

3 In United States District Court

[Title omitted.]

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the honorable Edwin L. Garvin and Marcus B. Campbell, judges of the District Court of the United States for the Eastern District of New York, at the borough of Brooklyn, this 10th day of March, in the year one thousand nine hundred and twenty-three.

4

[L. S.] PERCY G. B. GILKES,
Clerk.

By J. G. COCHRAN,
Deputy Clerk.

SIDNEY V. LOWELL,
Plaintiff's Attorney.

Office and post-office address, 189 Montague Street, borough of Brooklyn, New York City, New York.

5 In United States District Court

Bill of complaint

[Title omitted.]

The plaintiff complains and alleges as follows:

First. That John G. Johnson died at Kings County, New York, March twenty-fourth, nineteen hundred and seventeen. He had always been a born citizen of the United States and also was for fifty years prior to that date a resident and citizen of the State of New York; that he died intestate; that on the twenty-sixth day of March, nineteen hundred and seventeen, letters of administration upon the goods, chattels, and credits which were of said John G. Johnson were issued solely to the plaintiff by the Surrogate's Court of Kings County in the State of New York and that the same now are and ever have been in full force and effect.

6 Second. That the defendant, Henry P. Keith, at the dates and times hereinafter referred to herein was collector of internal revenue of the United States for the first district, in the State of New York and acting as such; that he is now a resident in the Eastern District Court District of the State of New York.

Third. That on the twenty-eighth day of March, nineteen hundred and eighteen, plaintiff made and filed with the defendant, Henry

P. Keith, as collector of internal revenue of the United States for the first collection district of the State of New York, her return as administratrix of the estate of John G. Johnson, deceased, of the income received by her as such administratrix for the period of the year nineteen hundred and seventeen between March twenty-six and December thirty-first, inclusive; that she was forbidden by the said collector and by the rules of the Treasury Department of the United States and its Commissioner of Internal Revenue to make any deductions in such return for inheritance taxes paid by her as such administratrix out of the income of the said estate or otherwise and was required to make a return of income without any such deduction and to pay the full tax upon all the income that she had received without any deduction or offset or consideration of such outgo for taxes to said collector, and she was threatened by said collector with the distraint and sale of the decedent's estate in her hands—a large property—if she failed to make such return and payment.

That as administratrix aforesaid during the year nineteen hundred and seventeen at the portion of the year aforesaid she had been obliged to pay inheritance taxes levied upon the estate in her hands and being against herself as such administratrix as follows:

7

1917:	
June 27. Inheritance tax paid State Colorado	$286.72
June 29. Inheritance tax paid State West Virginia	232.59
Sept. 4. Inheritance tax paid State Kentucky	208.24
Sept. 20. Inheritance tax paid State New York	233,044.20
Sept. 20. Inheritance tax paid State New Jersey	39,201.18
	273,092.93

And that she also, on September 21st and 22nd, nineteen hundred and seventeen, paid a tax on bonds to the State of New York amounting to one thousand one hundred forty-five dollars which she was entitled to deduct from said income, but was not allowed by said collector so to do.

1917—Sept. 21 & 22nd, bond tax paid State New York $1,145.00

Such inheritance taxes arose because of stocks held by decedent at his death in corporations organized under the laws of each of said States in value greatly exceeding said taxes in each instance.

That such inheritance taxes so paid far exceed the whole income received by plaintiff for the said portion of the year nineteen hundred and seventeen for which she made return of income, the entire income received without reduction for said taxes as returned and adjusted being one hundred sixty-four thousand nine hundred and fifty-eight dollars ($164,958). (Such return was for part of a year, because the decedent died when the year was partly run, and a separate return was made for what income he received.)

8

That the amount of income tax upon said sum of one hundred and sixty-four thousand nine hundred and fifty-eight dollars

($164.958) demanded by the defendant as collector aforesaid was thirty thousand nine hundred eighty-five and 53/100 dollars ($30,985.53).

Fourth. That solely to avoid the imposition of penalties in case of nonpayment of said income tax and of distraint and sale of goods, chattels, and credits that were of said decedent, John G. Johnson, in her hands as administratrix thereof, that on the thirty-first day of May, nineteen hundred and eighteen, the plaintiff paid said $30,985.53 to said defendant as collector aforesaid for said tax; but the same being paid under her protest that there was no income whatever owing to the disbursements for inheritance taxes aforesaid and that no tax or other sum was due the United States of America or said collector from her as such administratrix on account of income for the year aforesaid or any part thereof. That the same was demanded, collected, and received by said defendant from plaintiff without lawful authority so to do, namely, thirty thousand nine hundred and fifty-eight and 53/100 dollars ($30,958.53).

Fifth. That on June tenth, nineteen hundred and twenty-
9 one, the plaintiff, as administratrix aforesaid, made and filed with the collector of internal revenue for the United States of America for the first collection district of the State of New York a claim in writing for the refunding to her of the amount so paid (with other amounts to which she was entitled as stated in such claim), the same to be verified by him in the usual way as to payments and to be forwarded by him in the usual course to the Commissioner of Internal Revenue, which verification be duly made in said claim, and forwarded the said claim as verified to said commissioner on the eighth day of July, nineteen hundred and nineteen; that the said claim for refund and repayment so filed was duly made in all respects in accordance with the provision of law and the regulations of the United States Treasury Department established in relation of such matters; that said commissioner has made no decision upon said claim, though a much longer time than six months has elapsed since the filing of said claim and its being forwarded by the collector aforesaid to him.

Sixth. That no part of the sum asked for in the claim aforesaid or any part of the said income tax for the said part of the said year nineteen hundred and seventeen has ever been refunded or repaid or received by plaintiff; and that the whole sum thereof, in particular the sum of thirty thousand nine hundred fifty-eight and 53/100 dollars before set forth, is now due, owing, and unpaid to the plaintiff from the defendant with interest from March twenty-eighth, nineteen hundred and eighteen.

Seventh. That this is a suit of a civil nature at common law
10 and that the cause of action stated herein arose under the laws of the United States providing for internal revenue and arose in the Eastern United States District Court, District of the State of New York.

Wherefore the plaintiff demands judgment against said defendant for the sum of thirty thousand nine hundred fifty-eight and 53/100 dollars ($30,958.53) and interest from May thirty-first, nineteen hundred and eighteen, being a sum demanded of her by and collected and received by the defendant as collector of internal revenue as and for an income tax as herebefore set forth and for her costs of this action.

SIDNEY V. LOWELL,
Attorney for Plaintiff.

Sworn to by Emma B. Johnson; jurat omitted in printing.

11 In United States District Court

Title omitted.

Answer

Filed March 7, 1923

The defendant above named, by Ralph C. Greene, United States Attorney for the Eastern District of New York, his attorney, answering the complaint of the plaintiff herein, alleges and respectfully shows to the court as follows:

First. The defendant denies each and every allegation contained in said complaint in paragraphs marked or numbered "Third," except that the defendant admits that the plaintiff was required to and did file a return of income received by her as such administratrix for the period of the year 1917 between March 26th and December 31st, inclusive, said return being filed in the office of the collector of internal revenue for the first collection district of the State of New York.

12 Second. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fourth."

Third. The defendant denies each and every allegation in paragraph of said complaint marked or numbered "Fifth," except that the defendant admits that the plaintiff made and filed with him a certain paper writing claiming to be a request for refund of taxes.

Fourth. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Sixth."

Wherefore defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements of this action.

RALPH C. GREENE,
United States Attorney,
Eastern District of New York.

Office & post-office address:
Room No. 211 P. O. Bldg., Brooklyn, New York.

13 Sworn to by Guy O. Walser; jurat omitted in printing.

14 In United States District Court

[Title omitted.]

Answer

Filed Apr. 18, 1923

The defendant above named by Ralph C. Greene, United States Attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, alleges and respectfully shows to the court as follows:

First. That the defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Third," except that the defendant admits that on or about March 28th, 1918, the plaintiff made and filed with him as collector of internal revenue for the first collection district in the State of New York a paper writing purporting to be the return of the complainant as
15 administratrix of the estate of John B. Johnson, deceased, of the income received by her as such administratrix for the period of the year 1917, between March 26th and December 31st, inclusive.

Second. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fourth," except that the defendant admits that the complainant paid to him as such collector on May 31st, 1918, the sum of $30,985.53.

Third. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Fifth," except that the defendant admits that on or about June 10, 1921, the complainant filed with him as such collector a paper writing purporting to be a claim for refund.

Fourth. The defendant denies each and every allegation contained in paragraph of said complaint marked or numbered "Sixth," except that the defendant admits that he has not refunded to the plaintiff the sum of $30,985.53.

Wherefore defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements.

RALPH C. GREENE,
United States Attorney,
Eastern District of New York.
Room No. 211, P. O. Bldg., Brooklyn, New York.

16 Sworn by Henry P. Keith; jurat omitted in printing.

17 In United States District Court

Stipulation withdrawing answers

May 15, 1923

[Title omitted.]

It is hereby stipulated and agreed that the answers for the defendant herein, which have been made and served in this action, be withdrawn and that the defendant have three days within which to serve a demurrer in the action.

SIDNEY V. LOWELL,
Plaintiff's Attorney.
RALPH C. GREENE, Sr.,
U. S. Atty.

18 In United States District Court

[Title omitted.]

Demurrer

Filed May 21, 1923

The defendant above named, by Ralph C. Greene, United States attorney for the Eastern District of New York, hereby demurs to the complainant of the plaintiff herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Dated May 15, 1923.

RALPH C. GREENE,
United States Attorney,
Eastern District of New York.

Room No. 211 Federal Bldg., Brooklyn, New York.

19 In United States District Court

Notice of motion for judgment

May 26, 1923

[Title omitted.]

Please to take notice that I will move this court upon the pleadings in this action being the plaintiff's complaint and the defendant's demurrer thereto for judgment in favor of the plaintiff as demanded in the complaint at a term of this court for motions to be held at the United States post office building on Washington Street, Brook-

lyn Borough, city of New York, upon the sixth day of June next, at the opening of court on that day or as soon thereafter as counsel can be heard.

SIDNEY V. LOWELL,
Plaintiff's Attorney.

To RALPH C. GREENE, Esq.,
United States Attorney, Eastern District of New York,
Defendant's Attorney.

20 In the United States District Court

Order for Judgment on Demurrer

September 24, 1923

[Title omitted.]

This action being at issue in this court upon the complaint of the plaintiff and the Demurrer thereto on the part of the defendant both duly filed in this court and a motion for judgment on due written notice to the defendant's attorney having been duly made by the plaintiff, the same being made upon the said pleadings and such judgment to be in favor of the plaintiff as demanded in her said complaint, and said motion having been called for
21 hearing pursuant to said notice before a term of this court for motions held by Hon. Marcus B. Campbell, a judge of this court, on the sixth day of June, 1923, the return day of said notice, and the hearing on such motion having been duly postponed from time to time to June 20th, 1923, and on said latter date counsel on both sides having been duly heard in such motion both orally and on briefs submitted to the court; Sidney V. Lowell, plaintiff's attorney, having been so heard for the plaintiff and Ralph C. Green, defendant's attorney, for the defendant, and due deliberation on such motion having been had by this court and said motion having been decided in favor of the plaintiff.

Now on motion of said plaintiff's attorney it is ordered that the said motion of the plaintiff for judgment on the pleadings in this action as demanded in the complaint, being for judgment in her favor against the defendant for the sum of thirty thousand nine hunded fifty-eight dollars and fifty-three cents, with interest from May 31st, 1918, with her costs of this action, be and the same is hereby granted. And the clerk of this court shall enter judgment accordingly.

MARCUS B. CAMPBELL,
U. S. D. C. J.

22 Please to take notice that the order of which the within is a copy was duly filed and entered in the office of the United States District Court, Eastern District of New York, at the Post

Office & Court Building, on Washington Street, on the 26th day of September, 1923.

Dated, Sept. 24th, 1923.

SIDNEY V. LOWELL.

Office and P. O. address, 189 Montague Street, borough of Brooklyn, New York.

To Hon. RALPH C. GREENE,
Attorney for Defendant.

23 In United States District Court

[Title omitted.]

Judgment

September 26, 1923

This action having been at issue in this court upon the complaint of the plaintiff and the demurrer thereto on the part of the defendant, both having been duly filed in this court, and a motion for judgment on due written notice to the defendant's attorney having been duly made by the plaintiff, the same being made upon the said pleadings, and such judgment to be in favor of the plaintiff as demanded in her said complaint, and said motion having been duly heard, both sides appearing (the plaintiff by Sidney V. Lowell, her attorney, and the defendant by Ralph C. Greene, her attorney) before Hon. Marcus B. Campbell, a judge of this court, at a term of this court for motions in the June term, 1923, at Kings County, New York; and a written decision by said judge having been made
24 therein in favor of the plaintiff, and an order having been made by this court following the said decision on the motion aforesaid at a term thereof for motions held by the said judge, entered in this court, September 24th, 1923, directing "that the said motion of the plaintiff for judgment on the pleadings in this action as demanded in the complaint being for judgment in her favor against the defendant for the sum of thirty thousand nine hundred and fifty-eight dollars and fifty-three cents, with interest from May 31st, 1918, with her costs of this action, be and the same is hereby granted; and that the clerk of this court shall enter judgment according."

And the plaintiff's costs having been duly adjusted on notice to the defendant's attorney at the sum of

Now it is hereby adjudged and decreed that the plaintiff, Emma B. Johnson, as administratrix of the goods, chattels, and credits which were of John B. Johnson, deceased, have judgment against the defendant, Henry P. Keith, late collector of United States internal revenue for the first collection district of the State of New York, for and in the sum of forty-one thousand four hundred and

forty-three dollars and ten cents principal and interest and the sum of thirty-one dollars and fifty cents for her costs of this action, amounting together to the sum of forty-one thousand four hundred and sixty-four dollars and sixty cents.

Judgment entered this 26th day of September, 1923.

PERCY G. B. GILKES,
Clerk.

By JOHN A. LEAVENS,
Acting Clerk.

25 Please to take notice that the judgment, of which the within is a copy, was duly filed and entered in the office of the clerk of the United States District Court for the Eastern District of New York in U. S. Post Office & Court Building on Washington Street, Kings County, on the 26th day of September, 1923.

Dated, September 26th, 1923.

SIDNEY V. LOWELL,
Attorney for Plaintiff.

Office and P. O. Address, 189 Montague Street, Borough of Brooklyn, New York.

26 In United States District Court

[Title omitted.]

Opinion

Sept. 19, 1923

SIDNEY V. LOWELL, attorney for plaintiff; BENJAMIN MAHLER, of counsel.

RALPH C. GREENE, United States Attorney; NELSON T. HARTSON, Solicitor of Internal Revenue, of counsel.

CAMPBELL, J.:

This action comes before the court on a motion for judgment upon the pleadings.

It was brought by the plaintiff against the defendant to recover the sum of $30,985.53, with interest, alleged to have been illegally and erroneously assessed and collected as an income tax upon the estate of John G. Johnson, deceased, under the provisions of the revenue act of 1916, as amended by the revenue act of 1917.

27 The complaint alleges: That John G. Johnson died a resident of Kings County and a citizen of the State of New York, intestate, on the 24th day of March, 1917, and that letters of administration were granted upon his estate to the plaintiff; that the defendant, at the times referred to in the complaint, was the collector of internal revenue of the United States for the first district of New York, and acting as such, and was a resident of this district. That the plaintiff, on March 28, 1918, filed with the defendant her

return, as administratrix as aforesaid, of the income received by her as such administratrix from March 26th to December 31, 1917, both dates inclusive, but that she was not allowed to make any deduction in such return for inheritance tax paid by her as such administratrix out of the income of said estate or otherwise during the year 1917. That under protest and duress the plaintiff paid the following inheritance taxes:

June 27, 1917, to the State of Colorado	$286.72
June 29, 1917, to the State of West Virginia	232.59
Sept. 4, 1917, to the State of Kentucky	208.24
Sept. 20, 1917, to the State of New York	233,044.20
Sept. 20, 1917, to the State of New Jersey	39,201.18
Making a total of	273,092.93

That also, on Sept. 21 and 22, 1917, said administratrix paid
28 to the State of New York a tax on bonds belonging to the estate in the amount of $1,145; that said inheritance taxes so paid far exceeded the whole income received by the plaintiff from the said estate from March 28th to December 31st, 1917, the entire income received without reduction of said taxes as returned and adjusted being $164,958; that the amount of income tax upon said sum of $164,958, demanded by the defendant as collector and paid by the plaintiff as administratrix, was $30,985.53; that such payment was made solely to avoid the imposition of penalties in case of nonpayment of said income tax and distraint and sale of the goods, chattels, and credits that were of said estate, and that said payment was made under protest, and that the same was demanded, collected, and received by the defendant without lawful authority so to do; that on June 10, 1921, the plaintiff made and filed with the collector of internal revenue for the first collection district of New York a claim in writing for refund of the amount so paid, the same after verification to be forwarded by said collector to the Commissioner of Internal Revenue, and that said collector made such verification and forwarded said claim to the commissioner on June 8, 1919. That said claim for refund was made in all respects in accordance with the laws and regulations of the department, that said commissioner has made no decision upon said claim, and that more than six months have elapsed since the said claim was forwarded by the collector to the said commissioner; that no part of the said sum has been repaid to the plaintiff, and the necessary allegations showing the jurisdiction of this court.

29 To said complaint the defendant has demurred on the ground that the same does not state facts sufficient to constitute a cause of action.

The sole question which has been argued before me is whether the amount paid to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax, if any, to be levied for the described portion of the year 1917.

The plaintiff did not deem it necessary to argue for the allowance as a deduction of the amounts paid for inheritance taxes due the

other States, as the amount paid to the State of New York alone was far in excess of the amount of said income tax, and if the same was allowed as a deduction would more than wipe out the whole income tax.

Section 2 (b) of the revenue act of 1916 (39 Stat. 756) provides:

"Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: Provided, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed."

"Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

Section 5 (a) (3) of the revenue act of 1916 (39 Stat. 756), as amended by section 1201 of the revenue act of 1917 (40 Stat. 300) provides:

"SEC. 5. That in computing net income in the case of a citizen or resident of the United States—

"(a) For the purpose of the tax there shall be allowed as deductions—

"Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

From the foregoing quotations from the statutes it appears that all taxes paid by the estate during the year, except income and excess profit taxes and local improvement assessments, were allowable as deductions, and as inheritance taxes did not come within these exceptions they should, if paid by the estate, have been allowed as deductions, in which event no income tax would have been assessed,

as the amount paid for the New York transfer tax within the year exceeded the income tax assessed. United States v. Woodward, 256 U. S., 632.

The income reported and on which the tax was assessed was the income received during the administration of the estate, and was not income reported by a beneficiary or income to be distributed annually between persons entitled thereto.

The question presented therefore is, were the inheritance taxes alleged in the complaint in this action to have been paid to the State of New York imposed upon and paid by the estate and therefore allowable to it as a deduction, or were they, as the defendant contends, imposed upon and payable by the beneficiary and not by the estate, but in the instant case paid by the plaintiff for the benefit of the beneficiaries and allowable as deductions to the beneficiaries only and not to the estate.

The inheritance tax assessed by the State of New York
32 under the law as it existed both before and after the amendment of 1916 (now known as the transfer tax law) is not a tax on the property, in the ordinary sense of the term, but upon the right to dispose of the property, and it is not until it has yielded its contribution to the State that it becomes the property of the beneficiary.

United States v. Perkins, 163 U. S. 625;
Prentiss v. Eisner, 260 Fed. 589, affd. C. C. A., 267 Fed. 16; certiorari for appeal refused, 254 U. S. 647;
Matter of Swift, 137 N. Y. 77;
Matter of Merriam, 141 N. Y. 479;
Matter of Sherman, 179 App. Div. 497; affd. 223 N. Y. 540;
Matter of Hamlin, 185 App. Div. 153; affd. 226 N. Y. 407;
Matter of Hazard, 188 App. Div. 869.

The New York inheritance tax is not imposed upon the beneficiary and is not payable by the beneficiary.

United States v. Perkins (supra);
Matter of Swift (supra);
Matter of Merriam (supra).

While there are variances between the Federal estate tax and the New York transfer tax laws in respect to rates charged, the exemptions permitted and the deductions authorized, as well as in other particulars, the intrinsic nature and purpose of the tax is the same in each case and has been so held by the New York State
33 court, which allowed the transfer tax paid by an estate to be deducted in determining the estate's income tax under the State laws.

People ex rel. Home Trust Co. v. Law et al., State Tax Commissioner, 198 N. Y. Supp., 710, affd. by the N. Y. Court of Appeals, without opinion, N. Y. Law Journal, July 14, 1923.

There are but two entities to be considered in determining upon whom the tax is imposed and by whom it is payable, to wit, the

estate and the beneficiary, and the cases hereinbefore cited show that the New York transfer tax is the same in essentials as the Federal estate tax, and also that the New York transfer tax is not imposed upon or payable by the beneficiary; therefore it logically follows that the New York transfer tax is imposed upon and payable by the estate.

The New York transfer tax alleged in the complaint was paid by the estate and not by the beneficiary, and therefore could not have been claimed by the beneficiary as a deduction in determining his or her income tax, but should have been allowed as a deduction to the estate. The amount paid for the New York transfer tax having been greater than the whole income of the estate during the time specified, no income tax should have been imposed on the estate.

The demurrer of the defendant is overruled, and the motion of the plaintiff for judgment on the pleadings is granted.

Settle on notice.

U. S. D. J.

34 In United States District Court

Petition for writ of error

March 25, 1924

[Title omitted.]

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The defendant by his petition herein respectfully shows to the court that by the record and proceedings had herein in the above-entitled cause, and particularly by the decision and judgment of this court entered herein on September 26, 1923, overruling the demurrer interposed by the defendant and granting judgment on the pleadings in favor of the plaintiff and against the defendant for the sum of $39,058.53, with interest from May 31, 1918, and costs, manifest errors hath happened to the great damage and prejudice of the defendant, all of which more fully appear in the assignment of errors filed with this petition.

35 Wherefore the defendant prays that a writ of error may issue in behalf of the defendant out of the United States Circuit Court of Appeals for the Second Circuit, directed to the United States District Court for the Eastern District of New York, to the end that said errors may be corrected according to law, and for such other and further relief as may be just.

RALPH C. GREENE,
United States Attorney, Eastern District of N. Y.,
Attorney for the Defendant.

36 In United States District Court

[Title omitted.]

Order allowing writ of error

March 25, 1924

Upon motion of Ralph C. Greene, United States attorney for the Eastern District of New York, attorney for the defendant, and on the petition herein,

Ordered that a writ of error be, and hereby is, allowed and that the same be issued as prayed for, and it is further

Ordered that at any time within ninety days the defendant
37 may amend the assignments or error filed with the petition for said writ of error, and it is further

Ordered that the September term of this court be and hereby is extended ninety days from the date hereof for all purposes of this action.

MARCUS B. CAMPBELL,
District Judge.

In United States District Court

[Title omitted.]

Assignments of error

Now comes the defendant herein by Ralph C. Greene, United States Attorney for the Eastern District of New York, attorney for the defendant, and makes and files the following assign-
38 ment of errors, upon which the defendant will rely upon the prosecution of the writ of error to review the judgment of the court in the above-entitled cause, and alleges:

First. That the court erred in overruling the demurrer interposed by the defendant herein and particularly because the complaint herein failed to state a cause of action against the defendant.

Second. That the court erred in granting judgment in favor of the plaintiff and against the defendant on the pleadings, and particularly because of the court's ruling that the amount paid by the plaintiff to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax to be paid by the plaintiff.

Third. That the court erred in overruling the demurrer of the defendant and granting judgment for the plaintiff on the pleadings and particularly because the said ruling, order, and pudgment are contrary to law.

Wherefore the defendant prays that the said order and judgment of this court be reversed.

RALPH C. GREENE,
United States Attorney, Eastern District of New York,
Attorney for the Defendant.

39 [Citation in usual form omitted in printing.]

40 In United States District Court

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated that the foregoing contains a true and complete transcript of the record and proceedings had in this court in the above-entitled cause, as the same remain of record and on file in the office of the clerk thereof, and that the clerk may certify the same, and that the same be filed as the record on appeal herein.

April , 1924.

United States Attorney, E. D. N. Y.,
Attorney for Defendant.

Attorney for Plaintiff.

41 In United States District Court

[Title omitted.]

Order to file transcript of record

The foregoing printed record is hereby ordered on file for use by the clerk for certification of a record in lieu of the original papers.

April , 1924.

U. S. D. J.

42 In United States District Court

[Title omitted.]

Clerk's certificate

I, Percy G. B. Gilkes, clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct transcript of the record and proceedings of the said District Court in the above-entitled action as agreed upon by the parties.

In witness whereof I have caused the seal of said court to be hereunto affixed, at the city of New York, in the United States District Court, at the borough of Brooklyn, the city of New York, in the Eastern District of New York, this day of April, 1924.

Clerk.

43 In United States Circuit Court Appeals, for the Second Circuit

HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES INTERNAL REVENUE for the first collection district of New York, plaintiff in error,

against

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND credits which were of John B. Johnson, deceased, defendant in error

Stipulation re printing of tax returns, etc.

Apr. 7, 1924

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above-entitled action that the printing of the tax returns, claim for their refund, and the correspondence thereon shall be dispensed with as an unnecessary expense in the printing of the transcript of the record on appeal in this case, and that in lieu thereof the parties agree and concede that the amount paid by the plaintiff and the amount of refund demanded were as set forth in the complaint, that the payment was made under protest and the refund was duly demanded, and that the only question to be decided was whether a transfer tax paid to the State of New York is such a tax as should properly have been allowed as a deduc-
44 tion in computing the net income of the estate of John G. Johnson, deceased, for the period beginning March 24, 1917, and ending December 31, 1917, under the provisions of the revenue act of 1916 as amended and the revenue act of 1917 and any other United States revenue laws, if any, in force and bearing upon the question at the time mentioned in the complaint.

RALPH C. GREENE,
United States Attorney E. D. N. Y.,
Attorney for Defendant.
SIDNEY V. LOWELL,
Plffs. Atty.

45 In United States Circuit Court of Appeals

[Title omitted.]

Opinion

Before HOUGH and MANTON, C. JJ., and LEARNED HAND, D. J.

Writ of error to the District Court for the Eastern District of New York, Campbell, D. J., upon a judgment on demurrer for the plaintiff in an action at law.

Nelson T. Hartson for the plaintiff in error (defendant below).

B. Mahler and Harrison Tweed for the defendant in error (plaintiff below).

LEARNED HAND, D. J.: The action is to recover from the collector of taxes the amount of a tax paid under protest. The defendant demurred to the complaint; the district judge overruled the demurrer and gave judgment for the plaintiff.

The case was thus: The defendant died on March twenty-fourth, 1917, and the plaintiff, his administratrix, filed an income
46 tax return for the period of her administration in that year, from March 26th to December 31st, deducting the inheritance tax paid to the State of New York, which extinguished the whole income. The deduction was disallowed, and the plaintiff was taxed $30,985.53, which she was forced to pay. For the purposes of the case it is agreed that all the intestate's estate may be regarded as personal property.

Section 2(b) of the Federal revenue act of 1916 declares that the income of decedent's estates shall be subject to the income tax "and taxed to their estates * * * to be assessed to the executor or administrator." Section five of the same act provides that "in computing the net income in the case of a citizen or resident of the United States" there may be deducted "taxes paid within the year imposed * * * by the authority of any State," which must mean imposed on the citizen in question. Since there is no special section providing for deductions allowed to decedents' estates, this section must cover these as well as living persons. As section 2(b) assesses the tax against the executor personally, he is the "citizen or resident" of section 5 who may deduct the State tax. The case at bar, therefore, turns on whether the New York inheritance tax is "imposed" on him. At least, if it is so imposed, section 5 covers him. That is a question of New York law, and we are bound by the decisions of the New York Court of Appeals on that question.

The New York inheritance tax is imposed by section 220 of the tax law on "the transfer of property." This is ambiguous in respect of its incidence, but section 224 enacts that the tax shall be "a lien upon the property transferred and the executors * * * of every estate so transferred shall be personally liable for such
47 tax until its payment." We think that in principle under this provision the tax is "imposed" on the executor, and that it was so ruled in Home Ins. Co. v. Law, 204 App. Div. 590, affirmed in 236 N. Y. 607. There the New York inheritance tax was allowed as a deduction from the New York income tax upon a decedent's estate, under section 360 (subdivision 2), which follows verbatim section five of the Federal revenue act of 1916. Section 365 (subdivision 2) of the New York income tax law requires the executor to make the return and section 369 makes him "subject to all the provisions of this article which apply to taxpayers," one of which (section 351-b) makes the tax a debt against the taxpayer. While the Court of Ap-

peals wrote no opinion, it seems to us necessary to assume that they regarded the inheritance tax as "imposed" under section 360 (subdivision 2), because that was the only section which allowed the deduction. If so "imposed," it must be a duty in personam, because the income tax, as has been shown, is a debt, and the inheritance tax, in form also a debt, could not well be deducted unless it was a debt likewise.

Our own decision in Prentiss v. Eisner, 267 F. R. 16, following U. S. v. Perkins, 163 U. S. 625, compels the same conclusion. There we held that a legatee might not deduct the New York inheritance tax from his income tax. If neither he nor the executor may do so, the tax must be solely in rem, a conclusion effectively answered by section 224 above quoted. The defendant insists that the contrary is true, the New York inheritance tax being levied on one entity and the Federal income tax on another, each being an "estate" of the decedent differently conceived. It is true that the language of the statutes is not wholly clear, but we prefer to follow the customary categories while that course is left open to us. An
48 executor is vested with the personalty of the decedent, and here we are dealing only with personalty. While it is true that the New York inheritance tax is made a lien, that may well be only for security, and in any event personal taxes normally create duties in personam, and the executor or administrator is the natural person on whom to levy them.

U. S. v. Woodward, 256 U. S. 653, in effect holds the same thing. There the question was whether the Federal inheritance tax was deductible from income under section 214 of the act of 1918, which was the same as section five of the act of 1918. The Federal inheritance tax was by section 201 of the act of 1916 imposed upon the transfer of the "net estate of every decedent." By section 205 the executor must file the return, by section 207 he must pay the tax, and by section 209 it is made a lien. Thus the Federal inheritance tax is like the New York inheritance tax unless there is a difference between section 207 of the act of 1916 and section 224 of the New York tax law. We think that to say that the executor "shall pay" the tax is the same thing as to say that he shall be "personally liable" for it.

N. Y. Trust Co. v. Eisner, 256 U. S. 350, held that the New York inheritance tax was not a deduction in calculating the Federal inheritance tax. That case turned on the meaning of section 203 (a) (1) of the act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." It is quite true that the reason given was that inheritance taxes were "taxes on the right of individual beneficiaries" and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts U. S. v. Perkins, supra, but the
49 cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as

successor stricti juris, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax. There was reason to impute such a distinction to Congress, since the income tax is collected yearly, while the inheritance tax is levied once and for all. Both sovereigns might well insist upon an exaction on the whole estate for the privilege of its transfer.

We express no opinion as to the result in the cases of realty where the executor is not the successor, or even in the case of specific legacies.

Judgment affirmed.

50 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

Filed Nov. 28, 1924

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

C. M. H.
M. T. M.

52 In United States Circuit Court of Appeals

Clerk's certificate

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 51, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Henry P. Keith, as collector, etc., plaintiff in error, against Emma B. Johnson, as admx., etc., defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York in the Second Circuit, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-five and of the independence of the said United States the one hundred and forty-ninth.

[SEAL.] WM. PARKIN, *Clerk.*

53 In Supreme Court of the United States

Order allowing certiorari

Filed March 23, 1925

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this court that the said petition be, and the same is hereby granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

○

In the Supreme Court of the United States

OCTOBER TERM, 1924

HENRY P. KEITH, LATE COLLECTOR OF United States Internal Revenue for the First Collection District of New York, petitioner

v.

EMMA B. JOHNSON, AS ADMINISTRATRIX of the Goods, Chattels, and Credits Which Were of John B. Johnson, Deceased

No. ——

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General of the United States on behalf of Henry P. Keith, individually and as Late Collector of United States Internal Revenue for the First Collection District of New York, prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on November 28, 1924, affirming the judgment of the District Court of the United States for the Eastern District of New York against the petitioner and in favor of the respondent for the sum of $30,985.53, with interest from May 31, 1918, and costs.

32338—25——1

STATEMENT OF THE CASE

The complaint filed in this action shows that John B. Johnson died March 24, 1917, a resident of Kings County, New York. He left a large estate, upon which the net taxable income accrued between the date of his death and December 31, 1917, amounted to $164,958. The Federal Income Tax upon this income amounted to $30,985.53. The Administratrix during the period from March 24, 1917, to December 31, 1917, paid the following inheritance taxes:

June 27, 1917, to State of Colorado	$286.72
June 29, 1917, to State of West Virginia	232.59
Sept. 4, 1917, to State of Kentucky	208.24
Sept. 20, 1917, to State of New York	233,044.20
Sept. 20, 1917, to State of New Jersey	39,201.18
Total	273,092.94

The Administratrix also paid to the State of New York on September 21 and 22, 1917, a tax on bonds belonging to the estate in the amount of $1,145.00.

The Commissioner of Internal Revenue did not permit the deduction of any of the amounts so paid as "taxes paid during the taxable year."

The Administratrix on or about the 28th day of March, 1918, filed an income tax return for the estate of John B. Johnson covering the period beginning at the time of his death, March 24, 1917, and ending December 31, 1917. Although contending in this return that the above-mentioned inheritance taxes were deductible, the Administratrix, complying with the regulations of the Commissioner, did not take the deductions. She paid an

income tax amounting to $30,985.53. This payment is alleged to have been made under protest and duress. Thereafter a claim for refund was filed in which it is set out that the amount of inheritance taxes paid is deductible and that since this payment is more than the entire income of the estate no income tax accrued. The Commissioner of Internal Revenue rejected this claim on the ground that the inheritance taxes were not deductible, whereupon the plaintiff instituted this suit for the recovery of the entire amount of income tax paid.

The propriety of deducting the inheritance taxes paid to States other than New York and the propriety of deducting the tax on bonds is not in issue in this case, the parties having stipulated—

> that the only question to be decided was whether a transfer tax paid to the State of New York is such a tax as should properly have been allowed as a deduction in computing the net income of the estate of John G. Johnson, deceased, for the period beginning March 24, 1917, and ending December 31, 1917, under the provisions of the Revenue Act of 1916, as amended, and the Revenue Act of 1917, and any other United States Revenue Laws, if any, in force and bearing upon the question at the time mentioned in the complaint.

The defendant demurred, the District Court overruled the demurrer, and upon failure of the defendant to answer over entered judgment against him in favor of the plaintiff. The defendant there-

upon sued out from the Circuit Court of Appeals for the Second Circuit his writ of error to the District Court. The Circuit Court of Appeals affirmed the judgment of the District Court, wherefore the defendant, plaintiff in error in the former court, petitions this Court to grant him a writ of certiorari.

QUESTION PRESENTED

Are transfer taxes paid to the State of New York deductible for Federal Income Tax purposes from the gross income of a decedent's estate in the process of settlement under the provisions of Section 5 (a) (3) of the Revenue Act of 1916, as amended by Section 1201 of the Revenue Act of 1917?

STATUTES INVOLVED

Section 2 (b) of the Revenue Act of 1916 (39 Stat. 756, 757) provides:

> Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, and the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed

to the executor, administrator, or trustee, as the case may be: *Provided,* That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries.

Section 5 (a) (3) of the Revenue Act of 1916 (39 Stat. 756, 759), as amended by Section 1201 of the Revenue Act of 1917 (40 Stat. 300, 330), provides:

SEC. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits.

The pertinent provisions of the New York Transfer Tax Law and of the regulations promulgated thereunder are set out in the Appendix.

REASONS FOR GRANTING THE PETITION

1. Although this Court has held in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345, that the transfer tax imposed by the State of New York is not deductible from a decedent's gross estate for Federal Estate Tax purposes because it is not a charge against that Estate, the judgment of the Circuit Court of Appeals in this case is based upon the conclusion that the transfer tax *is* a charge against the decedent's estate.

2. The Circuit Court of Appeals departs from the rule established by this Court, and other courts, that the Revenue Act of 1916 creates for income tax purposes a taxable entity upon which the Federal Income Tax is imposed.

3. The right to deduct inheritance taxes paid from the gross income of an estate in the process of settlement is a right claimed by every taxable estate and the principle involved is not restricted to taxes imposed by the State of New York. The question is, therefore, one of great general importance, and affects the rights of a great number of taxpayers as well as a great amount of Governmental revenue. Ordinarily the inheritance taxes imposed by the States are in such large amounts that they are greater than the income of the Estate for any one year. Ordinarily decedents' estates

are in process of settlement for only one year. The result is, therefore, that under the rule established by the Circuit Court of Appeals the provisions of the Federal Act imposing a tax upon the income received by Estates in the process of administration are nullified.

4. The rule laid down by the Circuit Court of Appeals is expressly restricted by the Court to such taxes as are imposed by the State of New York upon distributive shares. It is not applied to such taxes when levied upon devises, inheritances, or specific bequests. Whether it applies to general legacies is not determined. The rule, therefore, in many cases requires the allocation of the tax between several gifts to the same beneficiary. But the tax is levied (except in certain cases where an amendment of the Act changes the rate after a taxable transfer, e. g., a transfer in contemplation of death, has been made) at a graded rate upon the aggregate value of all the gifts to that beneficiary above exemption. It is, therefore, impossible in many cases to allocate the tax as required by the rule, so that, as a practical matter, it can not in many cases be followed.

Moreover, the statutes of New York impose the same tax and the same kind of a tax upon inheritances, devises, and specific bequests as is imposed upon general bequests and distributive shares. In all cases the tax is payable in the same way, through the same person (the personal representative), and by the same person (the beneficiary).

The rule is not only difficult, and in many cases, impossible, of application, but also it is arbitrary and inconsistent.

5. The question involved will be later presented to this Court in a writ of error directed to the United States District Court for the Southern District of New York in the case of *Farmers' Loan & Trust Company, Executor of Seligman,* v. *United States,* and in appeals from the Court of Claims in *Farmers' Loan & Trust Company, Executor of George Arents,* v. *United States;* and *Charles E. Hermann, Executor of Dellora R. Gates,* v. *United States.* If certiorari is not granted in the instant case, the Government will be bound by the judgment, although it may develop that the rule upon which it is founded is wrong.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

JAMES M. BECK,
Solicitor General

FEBRUARY, 1925.

BRIEF IN SUPPORT OF THE PETITION

ARGUMENT

The Revenue Act of 1916 provides that " income received by the estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates * * *." (Section 2 (b).) It further provides that in determining the taxable net income of the estate there may be deducted from the gross income of the estate " taxes paid within the year imposed by the authority * * * of any State * * *." (Section 5 (a) (3).) The taxes which are thus deductible from the gross income of the Estate are taxes which are imposed upon the estate for, of course, Congress did not intend to credit against one person's income another person's taxes.

Northern Trust Company v. *McCoach*, 215 Fed. 991, 993;

National Bank of Commerce v. *Allen*, 211 Fed. 743, 746, aff. 223 Fed. 472, 477;

First National Bank v. *McNeel*, 238 Fed. 559, 560;

Elliott National Bank v. *Gill*, 218 Fed. 600, 601.

As this Court said in the case of *United States* v. *Woodward*, 256 U. S. 632, in construing a similar

provision of the 1918 Act relating to the deduction of taxes:

> The words of the major clause are comprehensive and include every tax *which is charged against* the estate by the authority of the United States. (Italic ours.)

The transfer tax imposed by the State of New York is not "charged against the Estate." This Court so said in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345, at page 350. Mr. Justice Holmes said:

> * * * "Charges against the Estate," as pointed out by the court below, are only charges that effect the estate as a whole, and, therefore, do not include taxes on the right of individual beneficiaries. This reason excludes not only the New York Succession Tax, but those taxes paid to other States which can stand no better than that paid in New York. * * *

The mere fact that the Executor is required to pay both the income tax and the New York Transfer Tax does not indicate that he is the "taxpayer" in any substantial sense. His liability to pay extends only to the value of the assets in his hands or his ability otherwise to recoup his payments from the real taxpayer. He is merely a collection agent for the sovereign.

New York Trust Company v. *Eisner*, 263 Fed. 620.

In re Gibon, 169 N. Y. 438.

Sherman v. *Moore*, 89 Conn. 190.

In the *New York Trust Company case, supra,* the learned District Judge said (p. 622):

> Estate taxes or probate duties levied by the State would fall within this clause. * * * But taxes levied on the shares to be received by beneficiaries, reducing not the estate, but the individual's share, can not be deemed a charge upon the estate merely because the duty, with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself.

The Federal Income Tax is imposed upon the Estate, the Act (Section 2 (b)) specifically providing that the tax shall be "taxed to their Estate." The statute looks to the Estate as a whole, although it may be in the hands of several representatives in several jurisdictions. For the purposes of identification it is true the statute permits the assessment in the name of the personal representative, and he is required to see that the tax is paid, but there is no personal liability except he fail to apply the assets of the Estate to the payment of the tax. (Revised Statutes, Sections 3166, 3167.) The statute looks to the *res* and treats that *res* as a taxable entity.

Merchants Loan & Trust Company v. *Smietanka,* 255 U. S. 509;

Catherwood v. *United States,* 280 Fed. 241;

Billings v. *State,* 107 Ind. 54.

So the Federal Estate Tax is imposed upon the Estate.

United States v. *Woodward,* 256 U. S. 632;

New York Trust Co. v. *Eisner,* 256 U. S. 345.

In this respect both Federal Taxes are different from the New York Transfer Tax, which is either imposed upon the Executor, as the court below said it was, following *Home Trust Company* v. *Law,* 198 N. Y. S. 710, affirmed without opinion, 236 N. Y. 607, or is imposed upon individual shares of the legatees.

See:

Re Vanderbilt, 10 N. Y. S. 239;

Re Garcia, 170 N. Y. S. 980;

Re Hacket, 35 N. Y. S. 1051.

Re Hubbard, 48 N. Y. S. 869;

New York Transfer Tax Laws, Sections 224, 226 (McKinney's Consolidated Laws of New York, Book 59).

In either event it is not imposed upon the person or estate or entity, whatever it may be called, that is required to pay and does pay the Federal Income Tax. It, consequently, is not properly deducted from the gross income of that taxpayer under the provisions of Section 5(a)(3) of the Revenue Act of 1916.

CONCLUSION

It is the opinion of the Government that the Circuit Court of Appeals for the Second Circuit has erred in deciding a question of great general

importance affecting a large number of taxpayers and a large amount of governmental revenue. The rule laid down by the court can not, in practice, be followed because it is in many cases impossible for the administrative officers to determine what part, if any, of the New York Tax is levied upon distributive shares or general legacies. The judgment of the court below is admittedly predicated upon a disregard of the reasoning of this Court in similar cases. The result is an "unworkable" rule permitting the deduction of a part only of a State tax, the part being dependent upon the nature of the property transferred, and the form of the transfer, although the State law in imposing the tax makes no such distinction. For these reasons it is respectfully submitted that the writ prayed for should issue.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1925.

APPENDIX

The following excerpts from Article 10 of the New York State Tax Law (Chapter 62, Laws of 1909, as amended) are pertinent to the inquiry in this case:

> SEC. 220. A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise to persons or corporations in the following cases. (The section then describes the various transfers which are taxable.)

Section 221 provides certain exemptions in the case of gifts to charitable organizations, etc., and to certain relatives.

> SEC. 221 (a) *Rates of tax.*—1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars to any father, mother, husband, wife, or child of the decedent, grantor, bargainor, donor, or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, bargainor, donor, or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, bargainor, donor, or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of
>
> One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

(Subdivisions 2 and 3 of Section 221 (a) provide for a like graded tax in the case of other classes. If the transfer is to a brother, sister, wife, and others the rates vary from two per cent to five per cent. If the transfer is to any other person the rates vary from five per cent to eight per cent.)

Section 221 (b) provides for an additional tax on investments in certain cases.

Section 221 (c) provides the rule for fixing a tax upon transfers from non-resident decedents.

Section 221 (d) provides for an optional method of commutation of tax on non-resident estates.

Section 222 provides for the accrual and time of payment of the tax.

Section 223 provides for discount and interest.

SEC. 224. *Lien of tax and collection by executors, administrators, and trustees.*— Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator, or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, ad-

ministrator, or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the tax commission or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator, or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator, or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator, or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Section 225 provides that in case a legacy is decreased by reason of the payment of debts the amount of tax paid shall be refunded by the executor or by the tax commission to the legatee.

Section 226 provides for taxes upon devises and bequests in lieu of commissions.

Section 227 provides that trust companies and other transfer agents shall be liable for the payment of the tax in certain cases.

Sections 228 to 242, inclusive, provide the procedure for the assessment and collection of the tax.

Section 243 defines the various terms used in the statute.

Sections 244 and 245 make the provisions of the general tax law of the State inapplicable to the transfer taxes.

The following are the pertinent provisions of the New York State Inheritance Tax Regulations promulgated under the above law:

> ARTICLE 12. *Incidence of the tax.*—The tax is imposed upon the transfer to each beneficiary and computed upon the amount passing to each such beneficiary. The amount of tax is determined by the value of the property transferred to each beneficiary and the relationship of the beneficiary to the transferor; it is not affected by the tax imposed upon any other beneficiary or by the exemption allowed to any other beneficiary, nor is it affected by the fact that the beneficiary is a nonresident or outside the jurisdiction of this State. If the property transferred consists of bonds of the several States or political subdivisions thereof, or of the United States, or if a legacy is payable from the proceeds of the sale of such bonds, the tax is nevertheless imposed, and whether or not such bonds are designated as tax exempt makes no difference.

ARTICLE 13. *Measure of tax.*—The tax is measured by the value of the interest of each beneficiary, which is determined by ascertaining the amount of such interest at the date of the transfer after deducting from the gross estate the amounts allowable for funeral expenses, debts, administration expenses, etc., as hereinafter set forth in Articles 151, et seq. The sum of all transfers to any one beneficiary taking effect at the same time is used in determining the amount of tax. If a beneficiary receives a specific bequest and a share of the residuary estate in addition, the value of both is added and the tax imposed on the total amount.

A transfer of property during the lifetime of the transferor with reservation of a life estate in him is taxable at the date of the transfer if there is no power of revocation reserved and no contingency under which the remainder may revert. Property so transferred is taxed separately from a transfer to the same beneficiary at death, and the statutory exemption is to be allowed in respect to each of the transfers. Where, however, a transfer is made during the lifetime of the transferor which does not become absolute until his death and the transferee is also entitled to a share of the transferor's estate under his will, or the intestate laws, the two transfers merge and are treated together in determining the amount of tax.

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TABLE OF CASES CITED

TABLE OF STATUTES

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 295

HENRY P. KEITH, LATE COLLECTOR OF UNITED States Internal Revenue for the First Collection District of New York, Petitioner

v.

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE Goods, Chattels, and Credits Which Were of John G. Johnson, deceased

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS IN THE COURTS BELOW

The opinion of the United States District Court for the Eastern District of New York, is reported in 294 Fed. 964, and is found in the Record at pages 10 to 14. The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 3 F. (2nd) 361, and is found in the printed Record at pages 17 to 20.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered by the District Court for the Eastern District of New York September 26th, 1923 (R. 9). It was affirmed by the Circuit Court of Appeals for the Second Circuit November 28th, 1924 (R. 20). Certiorari was granted by this Court March 23rd, 1925 (R. 21) (267 U. S. 1001), under Section 240, Judicial Code (c. 231, 36 Stat. 1087, 1157), as it stood before the Act of February 13, 1925 (c. 229, 43 Stat. 936), became effective (May 13, 1925).

STATEMENT

The question

The question presented by this record is whether or not, in calculating net taxable income for 1917, inheritance taxes paid to the State of New York are deductible from the gross income of a decendent's estate in the process of settlement under the provisions of Section 5 (a) (3) of the Revenue Act of 1916, as amended by Section 1201 of the Revenue Act of 1917.

FACTS

The complaint, the allegations of which were admitted by demurrer, shows (R. 2–5) that John G. Johnson died March 24, 1917, a resident of Kings County, New York. He left a large estate, from which the administratrix received between March 26, 1917, and December 31, 1917, a net income of $164,958, calculated without deducting from gross income the inheritance taxes listed below. The Fed-

eral income tax upon this income amounted to $30,985.53. The administratrix during the period from March 26, 1917, to December 31, 1917, paid the following inheritance taxes:

June 27, 1917, to State of Colorado	$286.72
June 29, 1917, to State of West Virginia	232.59
Sept. 4, 1917, to State of Kentucky	208.24
Sept. 20, 1917, to State of New York	233,044.20
Sept. 20, 1917, to State of New Jersey	39,201.18
Total	273,092.94

The administratrix on or about the 28th day of March, 1918, filed an income tax return for the estate of John G. Johnson, covering the period beginning March 26, 1917, and ending December 31, 1917. She contended then, as now, that the above-mentioned inheritance taxes were deductible from gross income of the estate. However, complying with the regulations of the Treasury Department, the administratrix did not take the deductions in the return. She paid the tax under protest and duress. Thereafter a claim for refund was filed. It is claimed that the amount of inheritance taxes paid was deductible by the estate and that since this payment was more than the entire income of the estate no income tax was payable. The Commissioner of Internal Revenue failed to act on the claim for refund within six months after the filing thereof, whereupon the administratrix instituted this suit for the recovery of the entire amount of income tax paid.

The parties have stipulated (R. 17):

> that the only question to be decided was whether a transfer tax paid to the State of New York is such a tax as should properly have been allowed as a deduction in computing the net income of the estate of John G. Johnson, deceased, for the period beginning March 24, 1917, and ending December 31, 1917, under the provisions of the Revenue Act of 1916 as amended and the Revenue Act of 1917 and any other United States Revenue laws, if any, in force and bearing upon the question at the time mentioned in the complaint.

The inheritance tax paid to the State of New York exceeds the net income on which the tax was assessed.

As the inheritance tax was paid during the period for which the income tax was assessed, and the taxpayer may have kept her books and made her return on a "receipts and disbursements" basis, there is involved in this case no question of the period within which the deduction should be taken, such as is involved in the *Yale and Towne Mfg. Co. case* (No. 420, No. 337) recently argued and submitted.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. (R. 7.) The District Court overruled the demurrer and granted plaintiff's motion for judgment. (R. 8, 14.) The judgment of the District Court was affirmed by the Circuit Court of Appeals. (R. 20.)

STATUTES INVOLVED

Section 2 (b) of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 757) provides:

> Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.
>
> Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting

which they make as such trustees or other fiduciaries.

Section 5 (a) (3) of the Revenue Act of 1916 (39 Stat. 756, 759) as amended by Section 1201 of the Revenue Act of 1917 (40 Stat. 300, 330), provides:

> SEC. 5. That in computing net income in the case of a citizen or resident of the United States—
>
> (a) For the purpose of the tax there shall be allowed as deductions—
>
> Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits; * * *

The material portions of Article X, New York Tax Law, are set out in Appendix "A."

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

First. That the Circuit Court of Appeals erred in affirming the judgment of the District Court overruling the demurrer interposed by the defendant and granting judgment for the plaintiff on the pleadings.

Second. That the court below erred in ruling that the amount paid by the plaintiff to the State of New York for inheritance tax should have been allowed as a deduction in determining the income tax to be paid by the plaintiff.

SUMMARY OF THE ARGUMENT

This Court has decided that taxes which are deductible from the income of an estate for the purpose of determining net income taxable under the Federal Income Tax Act, are those taxes which are "charges against the estate" and are "to be paid out of it by the administrator or executor substantially as other taxes and charges are paid."

This Court has also held that the transfer tax imposed by the State of New York is not a charge against the estate, but is a charge against the beneficiaries.

Furthermore, the New York tax is not paid by the personal representative of the decedent out of the mass of the property before distribution, as other taxes are paid, but is paid out of the particular shares after those shares have been determined.

Therefore a tax which is not imposed upon the estate is not deductible from gross income of the estate for the purpose of determining net income taxable under the Federal Income Tax Act.

ARGUMENT

The question involved in this case turns upon a construction of Section 5 (a) (3) of the Revenue Act of 1916, as amended by Section 1201 of the Revenue Act of 1917, which allows a deduction from gross income of the amount of taxes paid by the taxpayer when imposed by the laws of a State. *The question is whether the transfer tax imposed by the State of New*

York is to be taken as a deduction by the beneficiaries upon whose shares such tax is imposed, or is it to be taken by the estate.

In the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345, dealing with the computation of a Federal estate tax, this Court held that the New York transfer tax is not a charge against the estate, but is a tax on the right of the individual beneficiaries. Since that decision the Government has followed the rule there laid down and has allowed the deduction of the New York transfer tax to be taken by the beneficiaries in determining their net income for the purposes of Federal income taxation. It has not allowed the deduction to the estate. The respondent contends that the Government errs in following this rule and that the New York transfer tax is not what this Court has said it is, namely, a tax on the right of the beneficiaries, but is a tax on the estate, and is, therefore, to be deducted by the estate.

This Court, in the case of *United States* v. *Woodward* 256 U. S. 632, considered what constitutes a tax imposed and paid within the meaning of Section 214 (a) (3) of the Revenue Act of 1918, which is substantially the same as Section 5 (a) (3) of the Revenue Act of 1916 under which the instant case arises. In that case the question was whether the Federal estate tax was deductible in the Federal income tax return of the estate. This Court said (p. 633):

> The sole question for decision is, was the estate tax paid by the executors, and claimed

by them as a deduction in the income tax return for the year 1918, an allowable deduction in ascertaining the net taxable income of the estate for that year? The Court of Claims held that it was. 56 Ct. Clms. 133.

The solution of the question turns entirely upon the statutory provisions under which the two taxes were severally collected. The Act of 1918, by sections 210, 211 and 219, subjects the net income "received by estates of deceased persons during the period of administration or settlement" to an income tax measured by fixed percentages thereof; by sections 212 and 219 requires that the net income be ascertained by taking the gross income, as defined in section 213, and making the deductions named in section 214, and by section 214 makes express provision for the deduction of "taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes." This last provision is the most important one here. It is not ambiguous, but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones par-

> ticularly excepted. Indeed, the same act, by sections 400–410, expressly provides for their continued imposition and enforcement. Thus their omission from the excepting clause means that Congress did not intend to except them.
>
> The Act of 1916 calls the estate tax a "tax" and particularly denominates it an "estate tax." This Court recently has recognized that it is a duty or excise and is imposed in the exertion of the taxing power of the United States. *New York Trust Co.* v. *Eisner* [256 U. S. 345]. It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid.

From this decision it is apparent that Section 5 (a) (3) of the Revenue Act of 1916 allows a deduction of "every tax which is charged against the estate" and which "is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid." The question then resolves itself into this: Are the transfer taxes imposed by the State of New York charges against the estate paid out of it by the administrator or executor substantially as other charges and taxes are paid?

It will be observed that the New York tax (1) is not a charge against the estate but is a charge against the particular shares of the beneficiaries, and (2) is not paid by the executor or administrator substantially as other taxes and charges are paid, but is

paid by the executor or administrator out of funds furnished, not by the estate, but by the beneficiaries.

That this "transfer tax" imposed by New York is not a charge against the estate, has been definitely decided by this Court in the case of *New York Trust Company* v. *Eisner*, 256 U. S. 345. In that case the question was whether the New York tax was properly to be deducted from gross estate for the purpose of determining the net estate subject to the Federal estate tax imposed by the Revenue Act of 1916. That Act provided that there shall be deducted from the gross estate "such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction" under which the estate is being administered (Section 203 (a) (1)). This Court held that the New York tax was not "a charge against the estate," and was not within the language of the above section which expressly includes every payment made by the estate. The Court said (p. 350):

> "Charges against the estate" as pointed out by the court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York succession tax but those paid to other States, which can stand no better than that paid in New York.

The language of the court below thus referred to is as follows (*New York Trust Company* v. *Eisner*, 263 Fed. 620, 622):

> If this [the Federal Estate Tax] were a tax on the right of succession, an intention to tax only that which eventually passes to a beneficiary would be presumed. But, as a tax on the cessation of decedent's interest, such a presumption would extend at best to the entire net estate without deduction of any charges levied, not on it, but on the right or on the share of individual beneficiaries. What, then, are the "charges against the estate as are allowed by the laws of the jurisdiction" included in Clause G (*sic*)? Not *all* charges which under the laws an executor or administrator may or even must pay, whether for his own protection or otherwise, but only such charges, like all other deductions, which affect the estate as a whole, only charges against the estate.
>
> Estate taxes or probate duties levied by the state would fall within this clause. *Northern Trust Company* v. *Lederer* (D.C.), 257 Fed. 812. But taxes levied on the shares to be received by beneficiaries, reducing, not the estate, but the individual's share, can not be deemed a charge upon the estate merely because the duty, with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself. The nature of the tax, as a succession,

not an estate, tax, remains unchanged, despite the additional obligation thus imposed.

From the standpoint of the incidence of death duties, it is well recognized both in this country and in England that a difference exists between estate and probate duties on the one hand and legacy and succession duties on the other. This is clearly established by the cases of *Winans* v. *Atty. General*, (1910) Appeal Cases (House of Lords), 27, 30, 32, 37–38, 40–41, 47; *Knowlton* v. *Moore*, 178 U. S. 41, 48–49, 50–51, 68; and *Bugbee* v. *Roebling*, 94 N. J. Law, 438, 442–444, 111 Atl. 29, 31–32.

It was in virtue of the time-honored and thoroughly well established distinction between a death duty, such as the probate duty, the British estate duty, and the Federal estate tax, all of which fell or fall upon the estate as a whole, and legacy and succession taxes which do not so fall, that this Court held in *New York Trust Company* v. *Eisner*, *supra*, that the New York transfer tax was a tax "on the right of individual beneficiaries," and hence not a "charge" upon the "estate as a whole." This, too, constituted the distinction and the basis upon which the lower court rested its decision in the case of *New York Trust Company* v. *Eisner*, 263 Fed. 620, 622.

In affirming this decision, this Court, as did the court below, found it necessary to determine the nature of the taxes, the deduction of which was sought from the gross estate, and in so doing said (256 U. S. 345, 350):

> "Charges against the estate" as pointed out by the court below are only charges that

affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries.

The District Court in the case at bar does not explain why this holding is not conclusive. The Circuit Court of Appeals explains its refusal to follow this Court's decision in *New York Trust Company* v. *Eisner*, by saying (3 F. (2nd) 361, 362):

> *New York Trust Company* v. *Eisner*, 256 U. S. 350, held that the New York inheritance tax was not a deduction in calculating the Federal inheritance tax. That case turns on the meaning of Section 203 (a) (1) of the Act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." It is quite true that the reason given was that inheritance taxes were "taxes on the right of individual beneficiaries," and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts *United States* v. *Perkins*, [163 U. S. 625], but the cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as successor *stricti juris*, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax.

It is submitted that this reconcilation of the supposed inconsistencies of this Court overlooks the

Woodward case, supra, in which it is held that the Federal estate tax—which is a payment not imposed on the executor as successor *strictí juris* but solely "because he must distribute the estate"—is a charge against the estate. Furthermore, the holding of this Court in the *Eisner case* that the transfer taxes of New York were "taxes on the right of individual beneficiaries" and for that reason were not "charges that affect the estate as a whole" does not conflict with the decision in *United States* v. *Perkins*, 163 U. S. 625, and for two reasons.

In the first place the *Perkins case* arose under the New York law before it was amended in 1909 (Chapter 706, Laws of 1910, Section 242), while the *Eisner case* arose after that amendment. The effect of this amendment, as stated by Closson and Otis (Inheritance Taxation, 1917 Edition, page 349; 1922 Edition, page 702) is:

> Heretofore all estates above $50,000 had been subject to tax on the *entire amount*. Under the act of 1910, an exemption was made to *each beneficiary* and the theory of the tax was also changed. Instead of being imposed upon the right to *transfer* it was imposed on the *right to receive*.

In the second place it was not necessary in the *Perkins case* to determine the nature of the New York tax. The question presented was whether it lay within the power of the State of New York to exact a tax in respect to a bequest made to the

United States. Mr. Justice Brown, delivering the opinion of the Court, said (p. 628):

> * * * the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * *

United States v. *Fox*, 94 U. S. 315, cited in the *Perkins case*, is an example of the right inherent in a State to regulate testate successions. There a statute of New York provided that a devise of lands situate in that State might be made only to natural persons and such corporations, created under the laws of that State, as were authorized to take by devise. A devise of lands situate in the State of New York having been made to the United States, this Court held it to be void, saying (p. 320):

> The power of the State to regulate the tenure of real property within her limits, and the

> modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.

Possessing the right to regulate testate and intestate successions, the State may curtail, limit, or qualify that right by taxation; the succession depending, for its taking effect, upon the continuance of the permission of the State. Apposite in this connection is the following from the opinion in *Knowlton* v. *Moore*, 178 U. S. 41, 57, 58:

> The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual

> subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. * * * An illustration is found in *United States* v. *Perkins*, 163 U. S. 625, where the right of the State of New York to levy a tax on a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions. * * *

In the *Perkins case* no necessity arose for determining whether the tax imposed by New York was an estate tax or a legacy or succession tax, for whichever kind it was the result would have been the same. This is made abundantly clear by the Court when it said (163 U. S. 630), "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, *and it is only upon this condition that the legislature assents to a bequest of it.*" (Italics ours.) That the nature of the death duty under consideration in the *Perkins case* was unimportant, and that the decision would have been the same had it been concededly a legacy or succession tax, is further made manifest by the case of *Snyder* v. *Bettman*, 190 U. S. 249, where this Court held that the Federal legacy tax of 1898 was not a tax on the municipality by which the bequest was received. And whether the matter be viewed either in the light

of the prevailing or the dissenting opinion handed down in *Snyder* v. *Bettman*, the same conclusion necessarily ensues, namely, that the *Perkins case* would have been decided as it was decided irrespective of the nature of the tax. All that these cases hold is that a death duty of whatever kind is not imposed upon the recipient, but upon the transfer and is payable out of the property transferred. This is also the real holding in the case of *Prentiss* v. *Eisner*, 267 Fed. 16 (certiorari denied, 254 U. S. 647), where the Circuit Court of Appeals says that the New York tax requires "a contribution from the decedent's estate" as a condition upon which the right to transmit may be exercised. The point decided is, in the language of Mr. Justice Brown in the *Perkins case, supra*, that (p. 628):

> * * * the tax is not upon property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.

It is true of all death duties that they are not upon property and that they are taken from the property before it passes to the legatee. But death duties must be classified with reference to the time when the property yields its contribution to the State. If the tax is taken, as ordinary debts of the decedent and administration expenses are taken, from the mass of the property before determining the distributable portion and the amounts of the several shares, it properly belongs to that class of

death duties to which estate taxes and probate duties belong, but if the tax is taken from the distributable portions or the several shares after the amounts thereof are determined, it properly belongs to that class of death duties to which succession and legacy taxes belong. This is pointed out in *Knowlton* v. *Moore*, 178 U. S. 41, where it is said (p. 66):

> Thus it can not be doubted that, in assessing the tax, the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received be deducted from the mass of the

> estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded. The dilemna, therefore, which is involved in the contention that the statute imposes the tax, not on each legacy or distributive share, but on the whole personalty, is this: If the tax is levied and collected according to the classifications in the statute, it is clearly on the legacy or distributive share. If, on the contrary, it is levied on the entire personal estate, then the classifications of the statute must be ignored and the construction be upheld which maintains that the act has classified the rate of tax by the relationship of the beneficiaries to the deceased, and has then disregarded the classification by collecting the tax wholly without reference to such relationship. This construction, besides eliminating a large portion of the text of the act, would do violence to its plain import, which is to make the rate of the tax depend upon the character of the links connecting those taking with the deceased.

The New York Court of Appeals has recognized that by its inherent nature the incidence of the New York tax is upon the separate shares and that in this respect it differs from the Federal estate tax. It is

upon this incidence and difference that the case of *Farmers' Loan & Trust Company* v. *Winthrop*, 238 N. Y. 488, 144 N. E. 769, is based. In that case the court says (p. 498):

> Since we have construed the will as not containing any direction as to payment of any tax on property which does not pass under the will, it follows that the executor is bound to pay the entire Federal estates tax without right to reimbursement but he is entitled to reimbursement where he has paid the State taxes which are imposed upon the transfer of the trust estate to the beneficiaries and not upon the transfer of the decedent's estate as a whole upon his death.

The above case is significant as it was decided after the decision in *Home Trust Company* v. *Law*, 236 N. Y. 607, 142 N. E. 303.

This line of cases and the reasoning thereof also disposes of the contention that the New York tax is imposed upon the executor. The Court of Appeals of New York has held in the case of *In re Meyer*, 209 N. Y. 386, 103 N. E. 713, that (p. 388):

> The appraisal of the estate honestly and legally made and the nature of the bequests required that the transfer tax be fixed at $297.08. It came to pass, within the administration of the estate, without fault or delinquency upon the part of the executor, that the estate yielded a value less than the expenses of its administration. Therefore, the executor did not receive or acquire any money

> or property usable for the payment of the transfer tax. If he is not entitled to a final accounting and discharge from his office unless he shall produce a receipt for the payment of the transfer tax, he must pay it from his individual moneys or property although he has completely and honestly fulfilled the duties of his executorship. We think the Legislature did not intend or enact such result.

The mere fact that the executor must pay the tax in the first instance means nothing because the executor and the estate are reimbursed out of the property of the beneficiaries.

Furthermore, the New York tax is not paid "substantially as other taxes and charges are paid." Such charges are paid out of the total personalty prior to the allocation of that personalty to distributive shares or legacies. In other words, the amount for distribution is the personalty less debts and expenses, not the personalty less *tax*, debts, and expenses. This follows from the fact that the amount of the tax depends upon the amounts of the several shares and the status of the several beneficiaries.

The provisions of the State statute (section 224) relating to the payment of the New York tax likewise clearly show that the Legislature did not intend to enact and did not enact that the tax should be paid out of the funds of the estate before the distributive shares are determined. Its first concern was that the tax should be paid when due. It, therefore, provided that the executor should pay the tax and

that for the purpose of raising the necessary funds he should have power to sell so much of the decedent's property as should be necessary, "in the same manner as he might be entitled by law to do for the payment of the debts" of the decedent. Having thus protected the State, the Legislature proceeds to impose the burden of the tax upon the shares of the beneficiaries, whether such shares be personalty or realty. It makes each beneficiary personally liable for the tax on his share. It provides that the executor shall deduct the amount of the tax from the beneficiary's share of personalty, and if such share is not in money the executor is required to collect the tax thereon from the person entitled thereto and he can not be compelled to deliver the property until the beneficiary has paid the tax thereon. In the event that there are several succeeding estates in the same property, the court is empowered to apportion the tax amongst the several tenants and to determine the amount to be paid into the executor's hands by each of them. (Section 224.)

Manifestly these provisions are intended to impose and do impose the burden of this tax upon each beneficiary's share. They are entirely inconsistent with any idea that the burden of the tax is to fall upon the estate before the distribution. *Smith* v. *Browning*, 225 N. Y. 358, 122 N. E. 217. The statute further provides that in the event the estate proves insufficient to pay debts and the legatee is compelled

to refund a part of his legacy he is entitled to recover from the tax commission a pro rata part of the tax paid. (Section 226.) Manifestly, if the ultimate liability for the tax is upon the estate, and is not upon the legacy, the recovery of the overpaid tax would be by the executor as the representative of the estate and not by the legatee. In the case of *In re Gihon*, 169 N. Y. 443, 62 N. E. 561, the Court of Appeals of New York says (pp. 447, 448):

> Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. * * * No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee. A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax. * * * the full amount of the legacy is in law paid to the legatee and the deduction made from it and paid to the state or Federal government is paid on account of the legatee from the legacy which he receives.

Not only is it the clear intent of the law that the tax shall be taken from the distributive share, but also such in fact takes place in the operation as will be seen from the computation of the tax under various assumed circumstances made in Appendix C hereto. In every case it will be seen that the amount

for distribution is not decreased by the tax, although in certain cases the amount received by the beneficiary is decreased.

It is submitted that the New York Court of Appeals in *Home Trust Company* v. *Law*, 236 N. Y. 607, 142 N. E. 303, did not intend to overrule summarily and without discussion its own previous decisions and the decision of this Court to the effect that the New York tax is not a charge against the estate payable as debts and expenses are paid out of the estate before distribution, but is a charge against the respective shares of the beneficiaries. But if the court did so intend, and has settled the nature and incidence of the New York tax, that determination is not to be followed in this Court because it is subsequent to a construction of the same law of New York by this Court.

In *Carroll County* v. *Smith*, 111 U. S. 556, this Court says (p. 563):

> We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of *Hawkins* v. *Carroll County* [50 Miss. 735], with the respect which is due to the highest judicial tribunal of a State speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fullness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in *St. Joseph Township* v. *Rogers*, 16 Wall. 644, and adhere to the views expressed

> by this Court in *County of Cass* v. *Johnston*, 95 U. S. 360, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. * * *

But, the fact that the New York transfer tax has been recognized in that State as a proper deduction from the gross income of the decedent's estate in determining the net income subject to the New York income tax, is no sufficient reason to warrant a like deduction here where a Federal question is involved, namely, whether such tax is a proper deduction in ascertaining the net income of the decedent's estate under the Federal income tax law. Thus, in *New Jersey* v. *Anderson*, 203 U. S. 483, where the question at issue was whether certain license fees imposed upon a corporation by the State of New Jersey were entitled, under the Federal bankrupt law, to preferential payment upon the bankruptcy of the corporation, Mr. Justice Day said (p. 492):

> The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a Federal statute, giving a preference to taxes, is a Federal question, of ultimate decision in this court.

The case at bar also involves a State tax, but whether it is such a tax that it is a proper deduction under the Federal income tax law is a question for the exercise of an independent judgment of the Federal

courts. Not only has this Court in *New York Trust Company* v. *Eisner, supra*, determined that the tax is a charge upon the right of the individual beneficiaries of the estate, and not on the estate as a whole, but, as already pointed out, both under the New York statute and the decisions of the court of last resort in that State—decisions rendered not only before but also since the decision in the *Home Trust Company case, supra*—the incidence of the tax is placed upon the separate shares, legacies and devises of the several beneficiaries, the executor or administrator being required either to deduct the tax from the legacies before making payment to the legatees, or to collect it from the heirs, devisees or the legatees of specific bequests, and being, as stated in the case of *In re Meyer, supra*, "in a sense, the collector for the State."

However, the *Home Trust Company case* is not inconsistent with the views of this Court, for in that case the question was whether the New York transfer tax could be deducted in computing the State income tax under a construction of the New York income tax law. The court held that it could be. It may be that under the New York income tax law a tax which falls upon the estate after determination of each share is deductible from gross income. But such a tax is not deductible from gross income under the Federal income tax act.

The Federal Act imposes an income tax upon the income received by the estate of a decedent during the process of administration. The tax is to be

assessed in the name of the fiduciary not because it is imposed on the fiduciary but for the purpose of identification and to distinguish it clearly on the collector's books from the tax on the decedent's income. By express words of the Act the tax is to be "taxed to the estate." (Sec. 2 (b) of the Revenue Act of 1916.) This estate is a legal entity separate and distinct from the decedent, from his executor, and from the beneficiaries severally or collectively. *Merchants' Loan & Trust Company v. Smietanka*, 255 U. S. 509; *Cuthbertson v. United States*, 290 Fed. 283. This entity is permitted to deduct for the purpose of determining its net income the amount of taxes paid when such taxes are imposed by the authority of any State. But it is incongruous to say that a tax is imposed upon an estate before distribution when the estate before distribution is not reduced by the payment of the tax. As shown by the examples set forth in Appendix C of this brief, the result of the payment of the New York tax is that the amount of the estate is not reduced by its payment. The tax, therefore, is not "imposed" upon the estate.

In *United States v. Kindred Company*, 17 Wall. 322, where Section 122 of the Internal Revenue Act of June 30, 1864, was involved this Court held that a tax is only "imposed" upon the person whose property is reduced by its payment. Section 122 provided that railroad and certain other companies specified "indebted for any money for which bonds * * * have been issued * * * upon which interest

is stipulated to be paid * * * shall be subject to and pay a tax of 5 per centum on the amount of all such interest." Under this Section the Court held that the tax of 5 per cent was not "imposed" upon the corporation, but was a tax upon the bondholder. In reaching this conclusion the Court said (p. 326):

> In the cases we are considering the corporation parts not with a farthing of its own property. Whatever sum it pays to the Government is the property of another. Whether the tax is 5 per cent. on the dividend or interest, or whether it be 50 per cent. the corporation is neither richer nor poorer. Whatever it thus pays to the Government, it by law withholds from the creditor. If no tax exists, it pays 7 per cent., or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax it pays exactly the same sum to its creditor, less 5 per cent. thereof, and this 5 per cent. it pays to the Government. The receivers may be two, or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed.

In the case at bar it was said by the court below (3 F. (2nd) 361, 362):

> We express no opinion as to the result in the cases of realty, where the executor is not the successor, or even in the case of specific legacies.

And there might well have been added, inasmuch as they fall in the same category as realty and specific legacies, property transferred in contemplation of, or intended to take effect in possession or enjoyment at or after, death, property held by the decedent and another with the right of survivorship, and property passing under a power of appointment. In all such cases the New York Transfer Tax is paid by the heir, the legatee of the specific bequest, the donee, the survivor, or the appointee, as the case may be, or, if paid by the executor in the first instance, he is entitled to reimbursement. Now the New York statute does not impose one kind of tax in respect to personalty not specifically bequeathed and a tax of another nature in respect to all other property, nor has any court in that State so much as suggested such a thing. Under the New York law the values of the properties passing to any one person are aggregated and the rates are graduated. Thus in a given case the aggregation may include the value of an *inter vivos* gift, devised realty, personalty specifically bequeathed, personalty passing under the residuary clause of the will, real and personal property held by the decedent and another as joint tenants, and appointed property. When to the aggregate value of all such property a graduated rate is applied a segregation of any part of the entire tax with the view of treating such part as having been levied in respect to any one of the properties would be a manifest impossibility, and equally im-

possible would be the conception that the transfer of certain of the properties were subjected to one kind of tax and the other to a tax having an entirely different nature or incidence.

In New York prior to the enactment of the State Act of April 2, 1925, but one kind of tax was imposed—whether the transfer be of realty or personalty. The Circuit Court of Appeals in the opinion below attempted to make a differentiation between the deductibility of the tax on the transfer of realty and on personalty. No such distinction is possible. All of the tax imposed by the State of New York is deductible or none of it is, and if the reasoning of the court below cannot be sustained in cases where the tax involves a transfer of realty, it cannot be sustained in any case.

Of course the Government does not contend that the imposition of a tax upon a part (or of several taxes upon all the parts) of an estate is not deductible. Thus a property tax on bonds being a part of the estate is deductible if paid by the estate.

The contention is that the tax *must reduce* the assets of the estate available for distribution, and that so long as the estate is entitled to reimbursement, as it is under the New York law, it is not in theory or in fact reduced by the payment. The Government does not contend that no one is entitled to the deduction, although this contention was made in the *Prentiss case, supra*, and the *Woodward case,*

supra. Since the *Woodward case* that theory is exploded and the Government grants to the beneficiaries the right to the deduction of the New York Transfer Tax since they are taxables, distinct from the estate, from whose property that tax is paid. This is thought to be in line with the well-settled principle that taxes are allowed as deductions only by those upon whom they are imposed. If any authority other than the statement of this Court in the *Woodward case, supra,* is required to sustain the proposition that the Federal Act contemplates the deduction of taxes only by the person who pays them, not in the sense of merely passing over the money but in the sense of bearing the burden of the imposition, such authority will be found in the long line of Federal cases holding that the mere duty to pay over a tax is not in itself sufficient to entitle a taxpayer to a deduction. *Northern Trust Company* v. *McCoach,* 215 Fed. 991; *National Bank of Commerce* v. *Allen,* 211 Fed. 743, 746, affirmed 223 Fed. 472, 477; *First National Bank* v. *McNeel,* 238 Fed. 559, 560; *Eliot National Bank* v. *Gill,* 218 Fed. 600, 601.

CONCLUSION

In view of this Court's decision in *New York Trust Company* v. *Eisner, supra,* it is submitted that the action of the Government in disallowing the deduction of the New York transfer tax from the gross income of the estate and allowing it to the respective

beneficiaries is in accordance with the correct rule and that the judgment of the court below should be reversed.

Respectfully submitted.

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DECEMBER, 1925.

Appendix A

Transfer Tax Law of the State of New York, being Article 10 of Chapter 62 of the Laws of 1909, as amended (Birdseye, Cumming & Gilbert's Consolidated Laws, vol 8, p. 8515 et seq.)

Sec. 220—

Taxable transfers.—A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the interstate laws of this state of any intangible property, or of tangible property within the state, from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint-stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences

of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership, and the decedent was a nonresident of the state at the time of his death; or when the transfer is by will or intestate law of capital invested in business in the state by a non-resident of the state doing business in the state either as principal or partner.

3. Whenever the property of a resident decedent, or the property of a non-resident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of intangible property, or of tangible property within the state, made by a resident, or of tangible property within the state or of any intangible property, if evidenced by, or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, except a corporation, foreign or domestic, or joint-stock company or association constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manu-

facturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership made by a non-resident or capital invested in business in the state by a non-resident of the state doing business in the state either as principal or partner by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. Whenever property is held in the joint names of two of more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.

8. The tax imposed hereby shall be upon the clear market value of such property, at the rates hereinafter prescribed.

Sec. 221—

Exceptions and limitations.—Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, or real property to a municipal corporation in trust for a specific public purpose, shall be exempted from and not subject to the provisions of this article. There shall also be exempted

from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, library, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more such purposes. There shall also be exempted from and not subject to the provisions of this article all property or any beneficial interest therein so transferred to any father, mother, husband, wife, widow or child of the decedent, grantor, donor or vendor if the amount of the transfers to such father, mother, husband, wife, widow or child is the sum of five thousand dollars or less; but if the amount so transferred to any father, mother, husband, wife, widow or child is over five thousand dollars, the excess above these amounts, respectively, shall be taxable at the rates set forth in the next section.

Sec. 221-a—

Rates of tax.—1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedent, grantor, donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of

One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars or more, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, donor or vendor, or to any child to whom any such decedent, grantor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers shall be at the rate of

Two per centum on any amount up to and including the sum of twenty-five thousand dollars;

Three per centum on the next seventy-five thousand dollars or any part thereof;

Four per centum on the next one hundred thousand dollars or any part thereof;

Five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of

Five per centum on any amount up to and including the sum of twenty-five thousand dollars;

Six per centum on the next seventy-five thousand dollars or any part thereof;

Seven per centum on the next one hundred thousand dollars or any part thereof;

Eight per centum on the amount representing the balance of each individual transfer.

Sec. 221–b—

Additional tax on investments in certain cases.

Sec. 221–c—

Exemption of certain personal property.

Sec. 222—

Accrual and payment of tax.—All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market

value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six.

Sec. 223—

Discount and interest.—If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged; provided, however, that whenever the payment of any tax imposed by this article and payable to a county treasurer has been heretofore or shall be hereafter tendered, through inadvertence, to the state comptroller within the period of time before interest attaches to said tax, if such tax is paid in full to the treasurer of the proper county within ten days thereafter, the county treasurer, when directed so to do

by the state comptroller, may receipt in full for such tax without collecting any interest imposed thereon by this section of the tax law.

Sec. 222-

Lien of tax and collection by executors, administrators and trustees. Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property is not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax, under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid, and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might

be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

Sec. 225—

Refund of tax erroneously paid.—If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction within two years from and after

the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraiser is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraiser is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. This section, as amended, shall apply to

appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect.

Sec. 226—

Taxes upon devises and bequests in lieu of commissions.

Sec. 227—

Liability of certain corporations to tax.—If a foreign executor, administrator or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the state comptroller or the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who was a resident or nonresident, or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, unless notice of the time and place of such intended delivery or transfer be served upon the state comptroller at least ten days prior to said delivery or transfer; nor shall any such safe deposit company, trust company, cor-

poration, bank or other institution, person or persons deliver or transfer any securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to, or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, under the provisions of this article, unless the state comptroller consents thereto in writing. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax and interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits or other assets, including the shares of the capital stock of, or other interests in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto, a penalty of not less than five or more than twenty-five thousand dollars; ,and the payment of such tax and interest thereon

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or of the penalty above prescribed, or both, may be enforced in an action brought by the state comptroller in any court of competent jurisdiction.

Sec. 228—

Jurisdiction of the surrogate.

Sec. 229—

Appointment of appraisers, stenographers and clerks.

Sec. 230—

Proceedings by appraiser.

Sec. 231—

Determination of surrogate.

Sec. 232—

Appeal and other proceedings.

Sec. 233—

Composition of transfer tax upon certain estates.

Sec. 234—

Surrogate's assistants in New York, Kings and other counties.

Sec. 235—

Proceedings by district attorneys.

Sec. 236—

Receipts from county treasurer or comptroller.—One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the

provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the state comptroller that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

Sec. 237—

Fees of county treasurer.

Sec. 238—

Books and forms to be furnished by the state comptroller.

Sec. 239—

Reports of surrogate and county clerk.

Sec. 240—

Reports of county treasurer.

Sec. 241—

Report of state comptroller, payment of taxes: refunds in certain cases. * * *

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the state comptroller, in the counties wherein this

tax is payable direct to him, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and the state comptroller or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state, to the credit of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller or the county treasurer shall turn over the amount so retained by him to the state treasurer as provided herein and by section two hundred and forty of this article, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller or the county treasurer shall refund any excess of tax so held by him to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the state comptroller or the county treasurer, bonds or other securities of the estate approved by the state comptroller, or the county treasurer, both as to the form of the

collateral and the amount thereof, for the purpose of securing the payment of the difference between the tax on said remainder at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed, which said bonds or other securities shall be held by the state comptroller, or the county treasurer, to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the state comptroller or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates and then to be finally disposed of in accordance with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the state comptroller of the actual vesting of all such contingent remainders.

If any executor or trustee shall have deposited with the state comptroller, or the county treasurer cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders at the highest rate as aforesaid, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the state comptroller, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the state comptroller, or the county treasurer, whichever is

entitled under the provisions of this article to receive the tax, the balance due on account of said tax.

Sec. 242—

Application of taxes.

Sec. 243—

Definitions.—The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individuals or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state. The words "tangible property" as used in this article shall be taken to mean corporeal property such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt. The words "intangible property" as used in this article shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt. The word "transfer," as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this

article. The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the curtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving.

Sec. 244—

Exemptions in article one not applicable.

Sec. 245—

Limitation of time.

APPENDIX B

A comparison of the provisions of the Federal Income Tax Laws of 1916 and 1918 and the New York Income Tax Laws material to this action

FEDERAL ACT OF 1916, AS AMENDED	FEDERAL ACT OF 1918	NEW YORK LAW (Chap. 627, Laws 1919)
SEC. 2. (b) (1) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates,	SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including— (1) Income received by estates of deceased persons during the period of administration or settlement of the estate;	SEC. 365.—1. The tax imposed by this article shall apply to the income of estates or of any kind of property held in trust, including: a. Income received by estates of deceased persons during the period of administration or settlement of the estate;
(2) and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests,	(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;	b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;
(3) and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be:	(3) Income held for future distribution under the terms of the will or trust; and	c. Income held for future distribution under the terms of the will or trust; and
(4) *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.	(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.	d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.
Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in	SEC. 219. (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction author-	2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers, except that there shall also be allowed as a deduction any

any accounting which they make as such trustees or other fiduciaries.

ized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

part of the gross income which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph d of subdivision one of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under section three hundred and fifty-nine, subdivision three.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

4. In cases under paragraph (d) of subdivision one of this section and in the case of any income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary of such estate or trust not a resident shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents.

SEC. 1204. (1) That subdivisions (c) and (e) of section eight of such Act of September eighth, nineteen hundred and sixteen, are hereby amended to read as follows:

"(c) Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any ben-

SEC. 369. Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the taxpayer for whom he acts, first, if the net income of such taxpayer is one thousand dollars or over if single, or if married and not living with husband or wife, or two thousand dollars or over if married and living with husband or wife, or second, if the net income of such taxpayer, if an estate or trust, is one

which apply to individuals. Such fiduciary shall make oath that he has sufficient knowledge of the affairs of such person, trust, or estate to enable him to make such return and that the same is, to the best of his knowledge and belief, true and correct, and be subject to all the provisions of this title which apply to individuals: *Provided*, That a return made by one of two or more joint fiduciaries filed in the district where such fiduciary resides, under such regulations as the Secretary of the Treasury may prescribe, shall be a sufficient compliance with the requirements of this paragraph: *Provided further*, That no return of income not exceeding $3,000 shall be required except as in this title otherwise provided.

SEC. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing

eficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals.

SEC. 214 (a) That in computing net income there shall be allowed as deductions:

(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess profits taxes allowed as a credit under Section 222; or (c) by the authority of any State or Territory, or any county, school district, mu-

thousand dollars or over or if any beneficiary is a taxpayer other than a resident of the state, which return shall state specifically the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the comptroller may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the comptroller or collector in the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

SEC. 360. *Deductions.* In computing net income there shall be allowed as deductions:

* * * *

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those

subdivision, of any State, not including those assessed against local benefits;

nicipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (e) in the case of a nonresident alien individual, by the authority of any foreign country (except income, war-profits and excess-profits taxes, and taxes assessed against local benefits of a kind tending to increase the value of the property assessed), upon property or business;

assessed against local benefits of a kind tending to increase the value of the property assessed, or third, by the authority of any foreign government.

Appendix C

Let it be assumed that a decedent left personal property worth $55,000, and that his debts and the expenses of administration were $5,000.

If the decedent died intestate leaving a widow and a brother as his next of kin, the widow takes $2,000 more than one-half, or $26,000; the brother takes the remainder, or $24,000. (Sec. 98, Art. III, Decedent's Estate Law, N. Y. Cons. Laws.) Their respective share would be taxed thus:

Widow, $26,000 less $5,000, balance $21,000 taxed @ 1% = ... $210

Brother, $24,000 (which is more than $500), $24,000 taxed @ 2% = ... $480

If the tax were paid out of the estate, the widow's share would be $2,000 plus ½ of ($48,000 − $690) $47,310, or $2,000 + $23,655 = $25,655, and the brother's share would be ½ of $47,310, or $23,655. But as the law operates the widow receives $26,000 − $210, or $25,790, and the brother receives $24,000 − $480, or $23,520. (*In re Gihon*, 169 N. Y. 443, 62 N. E. 561; *Re Smith*, 85 Misc. 636, 149 N. Y. Supp. 24.)

If the property consisted in part of two certificates of stock each worth $24,000, the administrator would deliver one certificate and $1,790 to the widow and would deliver the other certificate to the brother after collecting from him $480.

If there is, in addition, realty worth $10,000 the widow takes her dower free from tax. (*Re Weiler*, 139 App. Div. 905, 124 N. Y. Supp. 1133.) The remainder

is taxed to the brother. (Sec. 87, Art. III, Decedent's Estate Law, N. Y. Cons. Laws.) If the widow's expectancy is such that the present value of the brother's remainder is $8,000, the tax on his share is not increased by 2% of $8,000, but is computed thus:

Brother, $24,000 plus $8,000, or $32,000, which is more than $500.

$25,000 taxable @ 2% = $500
$7,000 taxable @ 3% = $210

Total..... $710

This increase in the tax falls entirely upon the brother; none of it being borne by the widow. It will also be noted that the amount of tax attributable to the brother's remainder in the realty cannot be segregated and identified, for if the value of such remainder be included in the first $25,000, the tax in respect thereto would be $160 ($8,000 taxable at 2%), but if the last $7,000 be treated as a part of such value, the tax in respect to the remainder would be $230 ($1,000 taxable at 2%, and the remaining $7,000 taxable at 3%). Under the New York law no occasion exists for any segregation, or attempted segregation. On the contrary, there is an aggregation of the values of the several properties passing to each beneficiary, and then an application of the graduated rates. In this connection, see pages 31 and 32, *supra*.

In the case of testacy, the same principles are applied. A striking example of the effect of the tax arises where the residue is left to a charity. An "estate tax" reduces this residue (*Y. M. C. A.* v. *Davis*, 264 U. S. 47), but the New York tax does not reduce the residue; it is paid out of the "taxable shares."

The case of a will which provides that all the tax shall be paid out of the residue, is no exception to the rule. In such case the tax falls upon the residue not by the law, but by the will. The testator has merely increased the respective gifts, other than the residue, by the amount of the tax thereon. (*In re Gihon, supra.*)

○

No. [redacted]295

In the Supreme Court of the United States

OCTOBER TERM, [redacted]1925

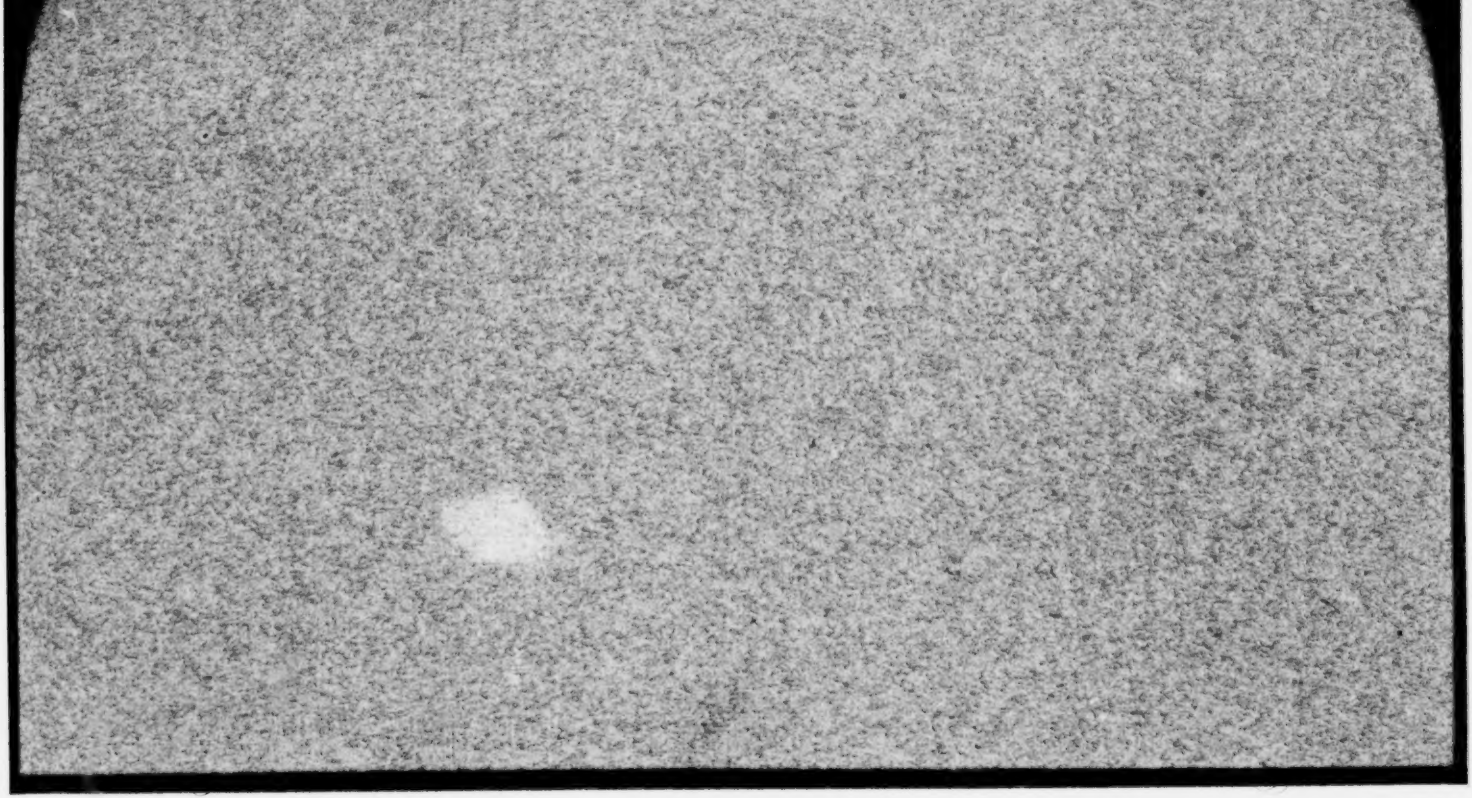
HENRY P. KEITH, LATE COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF NEW YORK, PETITIONER

v.

EMMA B. JOHNSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS WHICH WERE OF JOHN B. JOHNSON, DECEASED

Reply to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Opposition Thereto.

SIDNEY V. LOWELL,
Attorney for Respondent,
189 Montague Street,
Brooklyn, N. Y.



In the Supreme Court of the United States

OCTOBER TERM, 1924

HENRY P. KEITH, LATE COLLECTOR OF United States Internal Revenue for the First Collection District of New York, Petitioner

v.

EMMA B. JOHNSON, AS ADMINISTRATRIX of the Goods, Chattels, and Credits Which Were of John B. Johnson, Deceased.

As to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

RESPONDENT APPEARS AND OPPOSES THE ISSUE OF CERTIORARI

REASONS WHY CERTIORARI SHOULD NOT ISSUE

1. In the interest of speedy Justice the action of this Court upon the complementary side of the question at issue should be followed in refusing the writ and its delay. That is: the question being whether the New York State Inheritance Tax paid should be deducted from the Income received and allowed to the legatees or next of kin as may be or to the Estate authority making the payment, was decided adverse to the legatee in *Prentiss* v. *Eisner,* 267 Fed. R., pp. 16, 20, 21, in the Circuit Court of Appeals Second Circuit

and this Court refused to tie up the matter further and declined to issue its Certiorari.

Prentiss v. *Eisner,* 254, U. S. 647.

2. Apart from justice to the individual the Country is entitled to a speedy settlement of such a question.

3. It is respectfully submitted that the position of the honorable appellant flies in the face of common sense in that it makes a claim of right to compel an Income tax when there was no net income. However ingenious the plea the law abhors such a claim.

BRIEF OPPOSING THE PETITION

There are three phases of these cases:

1. Whether Inheritance Taxes paid are allowable out of Income to anyone. That general point was clinched by this Court in the world known *Woodward Case.*

United States v. *Woodward,* 256 U. S. 632.

2. The next phase was who was to have the benefit of the allowance of the Inheritance tax paid. There could be but two claimants: The one who actually paid the tax, the other one someone claiming it was paid for him. The Circuit Court of Appeals, as before stated, decided against the person who did not make the payment—the ultimate legatee, and this Court refused to grant a Certiorari as to the decision.

Prentiss v. *Eisner,* 267 Fed. 16, 21.
Prentiss v. *Eisner,* 254 U. S. 647.

3. The next—and it is most respectfully claimed should be the final phase, was the specific adjudication by the New York Courts that the New York Inher-

itance Tax was deductible by the estate for the purposes of the New York Income tax. That decision following the Woodward case and further deciding that the New York Inheritance Tax (called Transfer Tax) and the Federal Inheritance Tax (called Estate Tax) were in their nature and purpose the same.

Home Trust Company v. *Law*, 204 App. Div. 590.
Affirmed Court of Appeals, 236 N. Y. 607.

This Court has, particularly as to rules of taxation, not been inclined to lay down different constructions of State law than those as adjudicated in the State Courts of last resort.

This Court (opinion by HOLMES, Justice).
People ex rel Clyde v. *Gilchrist*, 262 U. S. 94, 97.

The Petitioner tries to jump out of the shoes carefully fitted to this case by all the Courts by claiming in effect that the Federal Inheritance tax is altogether another thing in operation than the New York tax because it is called an "Estate" tax while the New York act is called a "Transfer" Tax Act. That is merely an acrobatic attempt. Decisions are not so limber. They are made of stouter stuff.

THE CASE GENERALLY

The clear Opinions written in the Courts below make the whole question plain. While the Petitioner is without a single one on the point.

Johnson v. *Keith*, 294 Fed. 964.
Keith v. *Johnson*. See Opinion annexed.

The Northern Trust Company and other bank and Corporate Stock cases now put forward as if on a new theory have been cited in this case right along and no Court has considered them as even worth discussion. In those cases the tax was distinctly imposed on the stockholders individually. Then the outstanding feature in them was whether the corporation *or* the stockholder was entitled to deduct the tax, whereas here the question is whether the estate paying the tax may deduct the same or whether no one can deduct it.

LASTLY. It does not lie in the Petitioner's mouth to complain that the Opinion in the Circuit Court of Appeals below does not go far enough. Its moderation in restricting its application to the circumstances of the case ought not to shock him.

As a matter of fact the "uncertainty" and question of rates of tax, &c., are all in the way he flashes his lights. There are no fancy rates. The tax is a plain, hard fact on strong lines. It does not dance about. This claim is all a clear case of spectacular art.

The threat also that other cases may be affected by the decision in this case should be impotent. Of course that is so. If they arise under the same law, why should the claimants not recover back the money of which they were illegally deprived and which they have been kept out of for weary years; and all from endeavors to elude the effect of the decision of this Court in the Woodward case?

In line with the Prentiss case precedent as well as for other good reasons the writ should be refused.

SIDNEY V. LOWELL,
Attorney for Respondent.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY P. KEITH, LATE COLLECTOR OF United States Internal Revenue for the First Collection District of New York,
Plaintiff-in-Error
(Defendant below)

against

EMMA B. JOHNSON, AS ADMINISTRATRIX of the Goods, Chattels and credits Which Were of JOHN B. JOHNSON,
Defendant-in-Error
(Plaintiff below)

Before:

HOUGH and MANTON, *C.JJ.*

and

LEARNED HAND, *D.J.*

Writ of error to the District Court for the Eastern District of New York, CAMPBELL, D.J., upon a judgment on demurrer for the plaintiff in an action at law.

NELSON T. HARTSON,
For the Plaintiff-in-Error
(Defendant below)

SIDNEY V. LOWELL,
B. MAHLER and
HARRISON TWEED,
For Defendant-in-Error
(Plaintiff below)

LEARNED HAND, D.J.: The action is to recover from the Collector of Taxes the amount of a tax paid under protest. The defendant demurred to the complaint, the District Judge overruled the demurrer and gave judgment for the plaintiff.

The case was thus. The defendant died on March twenty-fourth, 1917, and the plaintiff, his administratrix, filed an income tax return for the period of her administration in that year, from March 26th to December 31st, deducting the inheritance tax paid to the State of New York, which extinguished the whole income. The deduction was disallowed and the plaintiff was taxed $30,985.53, which she was forced to pay. For the purposes of the case it is agreed that all the intestate's estate may be regarded as personal property.

Section 2 (b) of the Federal Revenue Act of 1916 declares that the income of decedent estates shall be subject to the income tax "and taxed to their estates * * * to be assessed to the executor or administrator." Section five of the same act provides that "in computing the net income in the case of a citizen or resident of the United States" there may be deducted "taxes paid within the year imposed * * * by the authority of any State," which must mean imposed on the citizen in question. Since there is no special section providing for deductions allowed to decedents' estates, this section must cover these as well as living persons. As Section 2 (b) assesses the tax against the executor personally, he is the "citizen or resident" of Section 5 who may deduct the State tax. The case at bar therefore turns on whether the New York Inheritance Tax is "imposed" on him. At least if it is so imposed, Section 5 covers him. That is a question of New York law and we are bound by the decisions of the New York Court of Appeals on that question.

The New York Inheritance tax is imposed by Section 220 of the Tax Law on "the transfer of property." This is ambiguous in respect of its incidents, but Section 224 enacts that the tax shall be "a lien

upon the property transferred and the executors * * * of every estate so transferred shall be personally liable for such tax until its payment." We think that in principle under this provision the tax is "imposed" on the executor, and that it was so ruled in *Home Ins. Co.* v. *Law*, 204 App. Div. 590, affirmed in 236 N. Y. 607. There the New York Inheritance Tax was allowed as a deduction from the New York Income Tax upon a decedent's estate, under Section 360 (subdivision 2), which follows verbatim Section five of the Federal Revenue Act of 1916. Section 365 (subdivision 2) of the New York Income Tax law requires the executor to make the return and Section 369 makes him "subject to all the provisions of this article which apply to taxpayers," one of which (Section 351-b), makes the tax a debt against the taxpayer. While the Court of Appeals wrote no opinion, it seems to us necessary to assume that they regarded the inheritance tax as "imposed" under Section 360 (subdivision 2), because that was the only section which allowed the deduction. If so "imposed," it must be a duty in personam, because the income tax, as has been shown, is a debt, and the inheritance tax, in form also a debt, could not well be deducted unless it was a debt likewise.

Our own decision in *Prentiss* v. *Eisner*, 267 F. R. 16, following *U. S.* v. *Perkins*, 163 U. S. 825, compels the same conclusion. There we held that a legatee might not deduct the New York Inheritance Tax from his income tax. If neither he nor the executor may do so, the tax must be solely in rem, a conclusion effectively answered by Section 224 above quoted. The defendant insists that the contrary is true, the New York Inheritance tax being levied on one entity and the Federal Income Tax on another, each being an "estate" of the

decedent differently conceived. It is true that the language of the statutes is not wholly clear, but we prefer to follow the customary categories while that course is left open to us. An executor is vested with the personalty of the decedent, and here we are dealing only with personalty. While it is true that the New York Inheritance Tax is made a lien, that may well be only for security, and in any event personal taxes normally create duties in personam, and the executor or administrator is the natural persona on whom to levy them.

U. S. v. *Woodward*, 256 U. S. 653, in effect holds the same thing. There the question was whether the Federal Inheritance tax was deductible from income under Section 214 of the Act of 1918, which was the same as Section five of the Act of 1916. The Federal Inheritance Tax was by Section 201 of the Act of 1916 imposed upon the transfer of the "net estate of every decedent." By Section 205 the executor must file the return, by Section 207 he must pay the tax and by Section 209 it is made a lien. Thus the Federal Inheritance Tax is like the New York Inheritance Tax unless there is a difference between Section 207 of the Act of 1916 and Section 224 of the New York Tax law. We think that to say that the executor "shall pay" the tax is the same thing as to say that he shall be "personally liable" for it.

N. Y. Trust Co. v. *Eisner*, 256 U. S. 350, held that the New York Inheritance Tax was not a deduction in calculating the Federal Inheritance Tax. That case turned on the meaning of Section 203 (a) (1) of the Act of 1916, especially the words "such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered." It is quite true that the reason given

was that inheritance taxes were "taxes on the right of individual beneficiaries" and for that reason not "charges that affect the estate as a whole." Literally the first clause quoted contradicts *U. S.* v. *Perkins*, supra, but the cases may be reconciled by understanding that the "charges" intended are only such as are imposed on the executor as successor stricti juris, like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax. There was reason to impute such a distinction to Congress, since the income tax is collected yearly while the inheritance tax is levied once and for all. Both sovereigns might well insist upon an exaction on the whole estate for the privilege of its transfer.

We express no opinion as to the result in the cases of realty where the executor is not the successor, or even in the case of specific legacies.

Judgment affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 295.

HENRY P. KEITH, late Collector of United States Internal Revenue for the First Collection District of New York,

Petitioner,

v.

EMMA B. JOHNSON, as administratrix of the goods, chattels, and credits which were of JOHN G. JOHNSON, deceased,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

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of Counsel

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INDEX.

LIST OF CASES CITED AND WHERE

STATUTES INDIRECTLY INVOLVED.

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Opinions in the Courts Below.

The opinion of the United States District Court for the Eastern District of New York, is reported in 294 Fed. 964, and is found in the Record at pages 10 to 14.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 3 F. (2nd) 361, and is found in the printed Record at pages 17 to 20.

THE "GROUNDS OF JURISDICTION",
THE "STATEMENT", the "FACTS" and
THE "STATUTES INVOLVED" are as

printed in Petitioner's brief.

Summary of the Argument.

That the payment of the New York Inheritance tax by the Administratrix being a lump payment of $233,044.20 was the ordinary payment of taxes imposed upon the Estate which the administratrix was compelled by statute to pay.

That the New York Inheritance tax is imposed upon the estate as is the Federal Tax. That the fact that the method of calculating it varies according to the degree of relationship of the beneficiaries to the decedent and amounts involved cuts no figure.

That the New York tax is paid by the personal representative of the decedent out of the mass of the property before distribution as other taxes are paid.

The Petitioner relies on a false theory in this: it contends that because the State Inheritance tax cannot be deducted from the capitalization of an Estate for the Federal inheritance tax—that therefore it cannot be deducted by an *Income Tax* payer from his gross income.

The Respondent says that's quite another thing!

ARGUMENT.

POINT I.

The New York Transfer Tax was a tax paid by the estate within the meaning of Section 5 (a) of the Revenue Act of 1916.

Since the Woodward case the Government some time ago admitted and now admits in its brief that the New York Transfer Tax is deductible either by the estate or beneficiary though it indicates the latter.

Consider what has been doing as to their belated contention that in New York only the beneficiary can recover back. They have while this claim has been kept off from final judgment in this Court, not won a single case on the point.

Including four decisions of the new board of Tax Appeals there are now seven new decisions that the Estate can recover.

Those new decisions are:

Johnson vs. *Keith,* 295 Fed. 964 (D. C. E. D. N. Y.);

Keith vs. *Johnson,* 3 Fed. (2nd) 361 (C. C. A. 2nd Cir.).

Farmers Loan & Trust Co. vs. *United States* (Corporation Trust Co. Income Tax service, p. 1082) (D. C. S. D. N. Y.);

Appeal of Farmers Loan & Trust Co. (3 Commerce Clearing House, U. S. Board of Tax Appeals Reports, p. 3578);

Appeal of Munson (3 Commerce Clearing House U. S. Board of Tax Appeals Reports, p. 3643);

Appeal of Young (3 Commerce Clearing House U. S. Board of Tax Appeals Reports, p. 3650);

Appeal of Lovett (3 Commerce Clearing House U. S. Board of Tax Appeals Reports, p. 3654).

The opinions in the five last mentioned cases are printed in full in Appendix B.

The Opinions of the Courts below are so carefully considered and well reasoned that this case really needs no other brief. The question in issue as those Courts pointed out is ruled by three adjudications. The Woodward case in this Court as to general recovery. The Prentiss case in the 2nd Circuit reinforced by the former Court to the effect that the beneficiary cannot recover and the Home Trust Case of the New York Court of Appeals that the Estate can recover.

In these days of voluminous briefs it seems necessary to meet long trumpeting with the same sounding instruments so the earlier cases will be modestly sounded.

But the question is a very narrow one, and the answer very simple. The question is whether the New York transfer tax is imposed upon the beneficiaries. If it is, the Government's contention is sound. If not, the Government's contention is wrong. There is no case which even suggests that the New York transfer tax is imposed on the beneficiaries. Undoubtedly it might have been. The Legislature might have said that when a person dies, those to whom the property passes shall be required to pay a tax measured upon the amount of the property which each of them has received and his relationship to the decedent. The constitutionality of such a tax would be sustainable upon exactly the same basis as any transfer or inheritance tax. If the Legislature had done this, it would have been necessary for

the taxing authorities to collect the tax from each of the beneficiaries by a personal action, or to collect it out of the property which might not be easily locatable. The Legislature knew that estates are administered under the supervision of the court, and that for a considerable period of time, generally a year, the executor or administrator has in his possession all of the personal property which belonged to the decedent. Obviously, it would be much simpler to collect a tax imposed upon the estate in the hands of the executor and payable by the executor out of that property. And this is just what the Legislature did. It provided that the tax should be a lien upon the property. It required that the executor should pay the tax before obtaining his discharge in the Surrogate's Court. It directed the executor to pay the tax out of the money to which the beneficiary would have been entitled but for the existence of the tax, or, if the beneficiary was entitled to property, to sell a sufficient amount of the property to pay the tax. The liability of the beneficiary is both in theory and practice, purely subordinate. How can it seriously be suggested that under such a statute the tax is imposed upon the beneficiary, when that is the very thing that the Legislature elected not to do?

The original Rules and Regulations of the Treasury Department—Income Tax Bureau were as follows, before the Woodward case decision.

Article 134, Regulation 45.

> "Since the tax (New York Transfer Tax) is imposed upon the transfer before the property reaches the legatees or distributee, it merely diminishes the capital share of the estate received by him, such tax is not imposed upon the legatee or distributee *and is not an allowable* deduction from his income."

The early cases run on the ideas, viz., which stated generally are: that the Tax is a "transfer" tax and that

the beneficiaries do not pay it,—that the decedent's estate pays it.

The New York Courts have held in a long line of unbroken decisions that its transfer tax is not laid upon legatees or payable by the legatees. An early case was the matter of *Swift, 137 New York, 77.* This case was cited with approval in *Prentiss* v. *Eisner* in the Federal Courts and has been cited with approval in practically every important court of appeals case dealing with the question of the transfer tax.

In the matter of *Merriam 141—N. Y., 479*—the court citing with approval its decision in the matter of Swift holds that "The transfer tax is payable even though the legatee was the United States." If this were a tax payable by the legatee, no tax payment would have been required, since the United States would be exempt.

In the Matter of Penfold, 216 N. Y., 168, a question arose as to whether the New York transfer tax should be computed upon the market value of the securities when left by the decedent or upon their value when received by the legatees. Were the tax payable by the legatee, the computation should clearly be on the value of the property received by him. Yet the court held that the market value of the securities at the time decedent dies, governs.

The Legatee Cuts no Figure. He Gets Nothing Until After the Tax is Paid With Estate Money.

The following authorities in the courts of the United States and New York State expressly hold that in the language of the Perkins case now cited and following it that: "The tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

We now come to the case of:

United States vs. *Perkins*, 163 U. S., 625 (1896).

This case has given the Petitioner's Counsel much anxiety. He strives on four pages to get around it. It is yet a leading case. While old it has been cited and relied on in substantially all the subsequent cases. It is referred to in the last decision, viz., in this instant case (side opinion in Record Judge Learned Hand, foot p. 19).

The case arose as to a bequest to the United States, and involved the question of the power of New York States to tax the bequest. It surveyed the powers of the State as to Inheritance Taxes on high general principles. The lapse of time and change of details in statutes have not affected the broad lines laid down in it. The opinion, (Brown, *J.*), contains this statement quoted time after time thereafter:

> "Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it; and it is not until it has yielded its contribution to the State that it becomes the property of the legatee" (p. 628).
>
> Matter of Merriam Estate, 141 N. Y., 479 and 484.

This is the original of the Perkins case, being the litigation begun in New York. And all that has been said of the case under Perkins' name applies here. It is on a line with the Swift case, its predecessor and which it followed.

The two Prentiss cases are referred to here in their order though treated elsewhere.

> *People ex rel Prentiss* vs. *Eisner* (*Collector*), 260 Fed. 589, A. N. Hand (D. J.), S. D. N. Y.

Same vs. *Same* (1920), 254 U. S. 647, Certiorari denied.

The great point in these cases is their following by citation the Perkins case, leading to decisions against the beneficiary.

In Re Sherman Estate 3rd Dept. N. Y. 179 App. Div. 497 (166 N. Y. Supp. 19, 24).
Ditto affirmed no opinion 223 N. Y. 540.

This is another case following by citation the Perkins, Penfold and other cases that held that the Federal Estate tax is not deductible from State Transfer Tax.

In Re Hazard 188 App. Div. 69 (177 N. Y. Supp. 369) 4th Dept. N. Y.

This holds that the N. Y. Transfer tax is not on property but the privilege of transfer. That it is based on the value at death.

In Re Hamlin 185 App. Div. 153 (172 N. Y. Supp. 787 and foot 789 and 790).

4th Dept. Held that the Fed. Estate Tax will not be deducted as to State Transfer Tax and that the former is payable out of the "residue" of the Estate.

In Re Hamlin affirmance of last case 226 N. Y. 407, 416.

There is an opinion by Hogan, *J.*

All these cases follow the Merriam Case (afterwards in name of Perkins U. S. ct.) and the Swift case.

We turn for variety to some cases arising in other States but along same lines:

Finnens Estate, 196 Pa. 72.

This holds that the Penn Estate tax follows the Estate for payment primarily rather than beneficiaries.

Jackson vs. *Meyers,* 257 Pa. 104, 107.

This case calls attention to the requirement of the act that the Executor pay the tax. The decision is like the Finnen Estate case, that the act makes the tax a lien on the estate primarily rather than on the legacies.

Corbin vs. *Townsend,* 92 Connecticut 501.

This case decides that both Federal and State inheritance taxes are "expenses of administration and to be deducted from the appraised value of the estate."

Hooper's Executors vs. *Shaw* cited in the above Connecticut case is 176 Mass. 190 (March 1900).

It decides that a legacy tax paid to the U. S. is to be deducted before paying the State succession tax.

The opinion by Holmes, Chief Justice, says:

> "Whatever the nature of the State Succession tax it is admitted and is obvious that the value of the property concerned is made measure of the tax. This appears from the words of the Act, which also show at what moment the value is to be taken. The words are 'property * * * which shall pass * * * to any person'. Without throwing doubt upon the power of the State to adopt a harsher rule, such as has been applied by some of the Surrogates in New York we are of opinion that these words most naturally signify the property which the legatee would get were it not for the State tax imposed by the sentence in which the words occur."

See In Re Merriam, 141 N. Y. 479, 484 S. C. Sub. nom. *United States* vs. *Perkins,* 163 U. S. 625, 630. It already has been decided upon this ground that ex-

penses of administration are to be deducted. *Callahan* v. *Woodbridge,* 171 Mass. 595, 599, 601.

> "The question is not one of procedure between the commonwealth and the United States as was put by the Assistant Attorney General. It is in substance one of Justice and in form one of Construction."

In *South Carolina* vs. *United States,* 199 U. S. 437, the opinion of the Court states:

> "Further it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in United States *v.* Perkins, 163 U. S. 625."

We now take up in their order the three major cases first referred to in this brief: Woodward, Home Trust and Prentiss.

In *United States* vs. *Woodward,* 256 U. S. 632, this Court strongly rejected the claim of the Government that the Estate Tax was not deductible for the purposes of the Federal Income Tax. That was the first victory in this Court of the taxpayer in his struggle for a fair construction of the provision of the income tax law permitting the deduction of Inheritance taxes paid. As indeed it was the first time that the question had fully and fairly come before the Court.

It is true and notable also that the Court of Claims against strong pressure and the weight of the World War time prejudice against any claim on the Government, had made a similar decision. It being on the Government's appeal in that case that the Woodward case so called was decided in this Court.

> *Woodward* vs. *United States,* 56 Court Claims 133.

This Court in the Woodward case after referring to the provision which is the very one involved in this case (said page 634):

> "This last provision is the important one here. It is not ambiguous, but explicit and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause where they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones particularly excepted. Indeed, the same act, by Sections 400-410, expressly provides for their continued imposition and enforcement. Thus their omission from the excepting clause means that Congress did not intend to except them."

This Court then stated briefly that the estate tax is a "tax", is a charge upon the estate, and is to be paid out of it "substantially as other taxes and charges are paid." All of this, we submit, applies equally to the New York transfer tax. Certainly, it is true that inheritance taxes were so well known at the time that Congress used the words under construction that, as the Supreme Court said of estate taxes, "their omission from the excepting clause means that Congress did not intend to except them."

In *Home Trust Company* v. *Law*, 204 App. Div. 590 (affirmed, 236, N. Y. 607), it was held that the New York transfer tax is deductible by the estate for purposes of the New York income tax. The Court referred to the Woodward case and said that if the New York transfer tax and the Federal estate tax

"are taxes of an identical or similar nature, we have in the case of United States *v.* Woodward (*supra*) a very definite precedent for drawing the conclusion that a transfer tax paid by an executor under the laws of this State during a given year is deductible from the gross income of the estate for the year in order to determine the State income tax due from the estate in that year."

After an examination of the two statutes, the Court reached the conclusion that "the intrinsic nature and purpose of the tax is the same in either case." Then, after referring to *United States* v. *Perkins,* 163 U. S. 625, the Court said (page 593):

"It follows from the decision that the present New York State transfer tax is not a tax upon legacies or legatees; therefore, that a legatee is not entitled to a deduction of such taxes paid, or any part thereof, in a calculation of his personal net income for income tax purposes."

In conclusion the Court said (page 594):

"Aside from authority and theory we think it was the clear legislative intent, as indicated by the various provisions of the Tax Law, that in calculating the net income of the estate of a decedent for income tax purposes, the amount paid by an executor during the year in satisfaction of a transfer tax should be deducted. The income tax payment is made by the executor of the estate from funds of the estate and not from funds belonging to legatees (Kings County Trust Company *v.* Law, 201 App. Div. 181). The Transfer tax payment is made by the executor from the funds of the estate. 'The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time.' (Matter of Hub-

bard, 234 N. Y. 179.) Thus the tax is measurable not by the funds received by a legatee, but by the funds the executor receives. As the burden of paying the income tax, as well as the burden of paying the transfer tax, is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax Law measurable by gross income received less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself pays."

As to the respect held by the United States Courts for such decisions, this Court has said:

The Court, per Holmes, Justice:

"While it is true we are not bound by the construction of the New York Statutes by the New York Courts in deciding the constitutional question, yet when we are dealing with a matter of local policy like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result. Troy Union R. R. Co. *v.* Mealy, 254 U. S. 47, 51."

Fairfield vs. *County*, 100 U. S. 48.
People ex rel. Clyde vs. *Gilchrist*, 262 U. S. 94, 97.

Many more similar cases could be cited. The general rule is too well known to call for them.

We Turn to the Prentiss Case in the U. S. Courts.

The argument that the New York transfer tax is deductible by the beneficiaries of the estate rather than by the estate is not open to the Government. The Second Circuit has decided, and this Court by denying a writ of certiorari has affirmed, that the New York transfer

tax is not deductible by the beneficiaries of the estate. (*Prentiss* v. *Eisner*, 267 Fed. 16; 254 U. S. 647.) The reasoning of the Circuit Court of Appeals in the Prentiss case thus leads to the Conclusion that the tax is deductible by the estate. After stating that *Matter of Penfold*, 216 N. Y. 163, decided that "the transfer tax is not a tax upon property but upon the right of succession to property," the Circuit Court of Appeals said (page 21):

> "Now a succession tax is a tax upon a transfer of property in general, and as such is distinguishable from a legacy duty, which is a tax upon a specific bequest. Under the New York law the succession tax creates a lien upon the estate of the decedent at the moment of his death. The right of the state to the amount of this lien attaches at that time, and it must be paid before the transferee, legatee, or devisee ever gets anything, and the executor or administrator is personally liable for the tax until it has been paid. Under such a law we do not see that the transferee pays the tax."

In conclusion that Court said:

> "The legacy which the plaintiff herein received under the will of her father did not become her property until after it had suffered a diminution to the amount of the tax, and the tax that was paid thereon was not a tax paid out of the plaintiff's individual estate, but was a payment out of the estate of her deceased father of that part of his estate which the State of New York had appropriated to itself, which payment was the condition precedent to the allowance by the state of the vesting of the remainder in the legatee."

It would seem that the Prentiss case effectually answers the whole argument of the Government. If we

understand that argument correctly, it is that Congress intended that there should be deducted from the income of the estate only the taxes which were an obligation of the estate regarded as a whole, and that the New York transfer tax is not such a tax but is an obligation placed upon the various items of property constituting the estate. But as before cited the Prentiss decision said that the New York tax "is a tax upon a transfer of property in general, and as such is distinguishable from a legacy duty, which is a tax upon a specific bequest." The New York Court of Appeals by affirmance has said substantially the same thing in the Home Trust Company case: "The transfer tax payment is made by the executor from the funds of the estate. * * * Thus the tax is measurable not by the funds received by a legatee, but by the funds the executor receives."

If the contention of the Government in that case was correct, the New York transfer tax is deductible neither by the estate nor by the beneficiary. Yet the Federal income tax statute says that in computing the net income of a taxable entity there may be deducted "taxes * * * (except income and excess profits taxes)," and this Court said in the Woodward case that the implications from the exception of certain taxes is "that there was no purpose to except any others." That the implication which this Court so drew was correct has been demonstrated by the fact that five months after the decision in the Woodward case Congress passed the Revenue Act of 1921, containing precisely the same provision and has recently re-enacted it in the Revenue Act of 1924.

See also:

Matter of Swift, 137 N. Y. 77.
Matter of Merriam, 141 N. Y. 479.

Matter of Sherman, 179 App. Div. 497, affd. 222 N. Y. 540.
Matter of Hamlin, 185 App. Div. 153 affd. 226 N. Y. 407.
Matter of Hazard, 188 App. Div. 869.
Edwards vs. *Slocum*, 264 U. S. 61.
Finnens Estate, 196 Pa. 72.
Jackson vs. *Meyers*, 257 Pa. 104, 107.
Corbin vs. *Townsend*, 92 Conn. 501.
Hooper Exrs. vs. *Shaw*, 176 Mass. 190.
South Carolina vs. *U. S.*, 199 U. S. 437.
Y. M. C. A. vs. *Davis*, 264 U. S. 47.
and *U. S. Tax Cases*, 2nd Supp. 1583, p. 51.
Montgomery (*Fed. Taxation*), Ed. 1925, pp. 974, 975.

The opinion of the Appellate Court below clears the case of all questions by its sagacious outlook and the taking of an allround view.

In it the word "imposed" as to taxes upon the Estate is dwelt upon (Record pp. 18 to 20).

Here it should be well considered that the estate of a decedent in process of settlement—before distribution—is a clear separate entity carefully provided for and the express creation of the statute as the Government's brief admits.

An important point in this connection is that the operation of the tax is not postponed until the Executor receives any property. The axe descends with the last breath of the decedent. The Executor takes the Estate charged with the Inheritance tax on all the property that existed then.

POINT II.

The theories which the Government advances are mere metaphysics and the precedents upon which it relies have been disputed right along by other cases or are not in point.

The theory of Petitioner's argument is founded on the idea that the New York Transfer Tax cannot be deducted from a Federal return of income if it is of such a nature that it may not be deducted (under the reasoning of the cases it cites) for purposes of the Federal Estate Tax. In that respect it claims that the New York State transfer act taxes the individual interests in a decedent's estate rather than the estate as a whole and therefore on that account the beneficiary only is entitled to a deduction from his income of the inheritance tax paid even though it was paid by the executor or administrator of the estate.

It especially in that regard cites and relies on the following cases:

In Re Gihons Estate, 169 N. Y. 443, 62 N. E. 561.
Knowlton vs. *Moore*, 178 U. S. 41.
New York Trust Co. vs. *Eisner*, 256 U. S. 345.

As these cases have recently all been closely reviewed and considered by the Board of Appeals and its conclusions are to be printed as a part of this brief and those conclusions appear fair, they are referred to to avoid duplication.

See Appeal of the *Farmers Loan & Trust Co. Case Decision*, No. 1052, Board of Tax Appeals, p. 3578, of 3 Commerce Clearing House Service.

The Respondent however more particularly relies upon the statement and conclusion as to the *New York Trust Co. case* in the opinion written by Judge Learned Hand in the Court below.

See Record, foot p. 19.

None of these cases—Gihon &c. are Income tax cases, but Inheritance tax. The decisions do not affect the case at bar. The reasoning in them is what Petitioner grasps at. It is not at all vital here. It does not always harmonize fully, it is quite true with the long line of decisions cited by Respondent in this Court and other jurisdictions. No recent cases have fully followed their particular reasoning.

Newer citations by Petitioner:

In Re Meyer and Smith vs. *Browning*, 209 N. Y. 386, 103 N. E. 713; 225 N. Y. 358, 122 N. E. 217.

There is nothing as to these cases bearing on this case.

Carroll County vs. *Smith*, 111 U. S. 556.

This case is on the point that in exceptional cases there may be reasons not to follow State Court decisions on their state matters.

United States v. *Railroad Co.*, 17 Wall. 322.

This is a case something like the Bank stock cases. Here interest on Bonds issued by the Railroad for debts due was taxable at the rate of five per cent and the holders of the Bonds were taxed rather than the Railroad—the Railroad paying and then suing the Government to get it back.

Northern Trust Co. v. *McCoach*, 215 Fed. 99.

National Bank of Commerce v. *Allen*, 211 Fed. 743, 746, affirmed 223 Fed. 472, 477.
First National Bank v. *McNeel*, 238 Fed. 550, 560.
Elliott National Bank v. *Gill*, 218 Fed. 600, 601.

The above Bank Stock cases have not been taken very seriously by any as important in these Income or Inheritance tax suits. The Corporations paid the tax on their shareholders stock but were not permitted to deduct it. There is no analogy between that class of cases and the case at bar. There the tax is clearly imposed on the individual stockholders and not upon the corporation which is required to pay it because that is a convenient way to collect it. The corporations had the unquestioned right to deduct the tax from stockholders' dividends or otherwise to obtain reimbursement. But the outstanding feature which distinguishes these cases from the present case is that there the question was whether the corporation or the stockholders was entitled to deduct the tax, whereas here the question is whether the estate may deduct the tax or whether no one can deduct it.

The other theory of Petitioner if it be separate from the one before referred to being that the New York Inheritance tax was not a "charge on the estate" is mixed with the one hereinbefore commented on, and the cases relied on by either side are the same. The cases relied on in both instances by Respondent are those cited in Point I.

As to the *Farmers Loan and Trust Company* vs. *Winthrop*, 238 N. Y. 488, 498, a fair comment is that the rule in the Home Trust Case was not meant to be reconsidered; that case and rule not being brought before the court.

However, the newer, broader-spirited contention of

the Government as to the stand it takes is summed up at the end of the Brief as follows, p. 25:

> "The contention is that the tax *must reduce* the assets of the Estate available for distribution and that so long as the estate is entitled to reimbursement, as it is under the New York law, it is not, in theory or in practice, reduced by the payment."

That seems to make this Appeal very fairly and easily decidable. Look at the facts: The executor is obliged to pay out of the Estates general funds the tax. That certainly reduces the estate. Does he get the money back from anyone? No! As against all persons interested in the Estate this payment is conclusive. They never had an interest in the estate so far as to include the Executor's tax payment. No receipt is needed from them. The Executor's voucher is his evidence of payment of the tax. The only thing is to calculate how much of the Estate left comes to each. It may be nothing as explained elsewhere here. The idea of "reimbursement" by any legatee or distributee has no foundation. The Executor, it is true, has to protect himself in the machinery of the Probate Courts by having the Estate appraised and an order of the Court made reciting the correct sum of the Estate Tax as to each person interested. Such order and the State Comptroller's receipt cover the case. In no case following the law do beneficiaries receive anything from the estate for which they are required to reimburse the Executor except in the case of devises of chattels not money where an exception is made apparently to cover heirlooms spoken of elsewhere in this brief to avoid a forced sale of them by the Executor. The Petitioner's Counsel does not rely on so small a point as that, it is fair to opine.

The Government Counsel has in his mind the reim-

bursement idea from the cases involving both the Federal Estate Tax and the State Inheritance Tax. In the former in the case of a Will, by the law the tax is all paid by the residuary part of the estate. As to the State Tax the rule as is well known is quite different, the tax being graduated by relationship, is divided into as many shares as interests though paid in one sum. The term that the estate is "reimbursed" has grown up as to the latter or State payment. Those beneficiaries do not get something (looked at in one way) for nothing, while the Federal beneficiaries (except the unfortunate "residuaries") do. But in sober earnest the State beneficiaries also do for all their interest is pure gift and the tax comes before they get it.

The small detail provisions spoken of in Petitioner's brief (p. 19) relating to making the beneficiary personally liable for the tax on his share and providing that the Executor where the bequest is of articles, not money, is to collect from the beneficiary the tax (evidently to prevent forced sale of heirlooms); and that if an estate apparently distributed) proves insufficient to pay debts and the legatee is compelled to refund a part of his legacy, he is entitled to recover from the Tax Commissioner a pro rata part of the tax paid,—are simply working details not bearing on the great questions of the Act. By the way the return last spoken of is directed to be paid to the Executor by the Section 225 of the Act cited by Petitioner unless the tax has actually been paid by the beneficiary—not a thing to be expected.

As to Petitioner's Points as to realty where the executor is not the successor, or specific legacies, and it may be added as to any real estate in the case of administrators.

(Foot page 30, and pages 30 and 31.)

As regards real estate (which does not go to an Ad-

ministrator at all) and real estate specifically devised to persons other than the executors or trustees by a Last Will, let it be said that no point arises in this case,—which is that of an Administratrix, who takes only personal estate.

The suppositious cases suggested in Petitioner's brief (pages 31, 32) would all be met by the machinery provided by the respective statutes and the implied powers following all great schemes of Government.

The Respondent's reply may be well amplified as follows:

At the very end of the Government's brief, the argument is made that, so far as the New York transfer tax is imposed on real estate, it ought not to be deductible by the estate because the real estate vested immediately in the beneficiaries and never became a part of the estate in the hands of the executor. It is then argued that since it would be very difficult to separate the tax on real estate from the tax on personalty, no part of the tax should be deducted. This may fairly be described as an attempt to make the tail wag the dog. But the argument lacks strength in other respects. In the first place, it is comparatively simple to allocate the tax even in the most complicated case. If a beneficiary receives $100,000 worth of real estate and $100,000 of personalty, and the New York transfer tax amounts to $8,000 it is true that it is impossible to say whether the higher rates applying when the value passes $100,000 applies to the real estate or to the personalty, but all that need be done is to allocate the total tax between the two classes of property in the proportion to their respective values. Thus, in the case put, $4,000 of the tax would be allocatable to the real estate and the same amount to the personalty. In the second place, it may be well to call to the attention of the Court that, in the case at bar, the decedent owned no real estate, so that the point does

not arise. Reference may also be made to the opinion of the District Court in *Farmers Loan & Trust Co.* v. *United States,* Corporation Trust Company Income Tax Service, p. 1082 (D. C., S. D. N. Y.), (Appendix, p. 28), where it was held that the transfer tax on real estate is deductible by the estate in determining net income.

Finally, the whole older theory of the appellant is founded upon the erroneous idea that the New York transfer tax cannot be deducted from a Federal return of income if it is of such a nature that it may not be deducted for purposes of the Federal Estate Tax.

However, the carefully worded, broader-spirited final statement of Petitioner's contention at page 26 of its brief hereinbefore cited and considered does not go so far.

The Claim that the New York Inheritance Tax is Vitally Different from the Federal One Has No Foundation.

That the acts are in principle vitally alike is settled by common knowledge and legal precedent.

Home Trust v. Law, 204 App. Div. 590; 236 N. Y. 607.

See Citations Federal Act, Secs. 201, 203, 204, 207, pp. 25, 26.

See Citations New York State Act, pp. 25, 26.

Secs. 220, 222, 223, 224, printed in Petitioner's Brief, pp. 35 to 43.

Secs. 230, 231 omitted there see this brief, p. 26.

POINT III.

Statutes imposing taxes are to be construed strictly against the Government.

In the *Gould case* (1917) Justice McReynolds, writing for this Court at page 153, said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen. U. S. *vs.* Wiggleworth, 2 Story 369; American Net &c. Co. *v.* Worthington, 141 U. S. 468 and 474; Benziger *v.* U. S., 192 U. S. 38, 55."

Gould vs. *Gould*, 245 U. S. 151.
Black on *Income and Other Fed. Taxes*, 4th Ed., Sec. 27.

Conclusion.

The decision of the Circuit Court of Appeals should be affirmed. The order of the District Court overruling the demurrer and the judgment thereon should be affirmed and costs should be awarded to the respondent.

Respectfully submitted,

SIDNEY V. LOWELL,
Counsel for Respondent.

HARRISON TWEED,
BENJAMIN MAHLER,
also of Counsel.

APPENDIX A.

STATUTES INDIRECTLY INVOLVED.

1st. Certain Provisions as to U. S. Estate Tax from U. S. Statutes.

Sec. 201. That a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or non-resident of the United States.

(All of first paragraph.)

(Here follow percentages of from one to fifteen per cent on sums from commencing at $50,000 and all above $5,000,000.)

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined.

a. In the case of a resident, by deducting from the value of the gross estate—

1. Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgage losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

2. An exemption of $50,000.

(All of first four paragraphs.)

SEC. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum calculated from the time payment is made to the date when the tax is due shall be deducted.

(All of first two sentences.)

SEC. 207. That the executor shall pay the tax to the collector or deputy collector.

(All of first sentence.)

All the above from U. S. Statutes at Large, Volume 1915-1917. All being of 1916 except that 201 is given as amended 1917. (Public Laws, Part I.)

The following are extracts from the Statutes of the State of New York as to inheritance or "transfer" taxes; being in addition to the extracts from such statutes printed in Appendix A of Petitioner's Brief.

SEC. 230. *Proceedings by appraiser.* (First paragraph, second sentence). The Surrogate either upon his own motion, or upon the application of any interested person, including the State Comptroller, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this article in counties in which the office of appraiser is salaried and in other counties, the County Treasurer to give the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by

mail to all persons known to have a claim or interest in the property to be appraised, and to such persons as the Surrogate may by order direct, of the time and place when he will appraise such property (second paragraph, first sentence).

The report of the Appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the Surrogate and the other in the office of the State Comptroller (last paragraph of text of section).

Tax Law (Laws 1909, Ch. 62, Consol. Laws, Ch. 50) as amended by Tax Law amdt., 1916, p. 719, by Chap. 550, Sec. 1.

Sec. 231. *Determination of Surrogate.* From each report of Appraiser and other proof relating to any such estate before the Surrogate, the Surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the Surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser (first paragraph of text of section).

Tax Law (Laws of 1909, Ch. 62, Consolidated Laws) as amended by

Tax Law Amendment, 1916, p. 721, by chapter 550, Sec. 2.

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APPENDIX B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE FARMERS' LOAN AND TRUST COMPANY and MORITZ WORMSER, as Executors of the Estate of JULIA SELIGMAN,

Plaintiffs,

vs.

THE UNITED STATES,

Defendant.

Action at law by the executors of the Estate of Julia Seligman to recover from the United States the sum of $4,741.75, with interest, alleged to have been erroneously assessed and collected as an income tax upon the Estate of Julia Seligman, deceased, under the provisions of the Revenue Act of 1921. Upon the pleadings both parties moved for judgment.

GELLER, ROLSTON & BLANC, attorneys for the plaintiffs (C. Alexander Capron and Russell L. Bradford, of counsel.)

EMORY R. BUCKNER, United States Attorney, for the defendant (F. C. BELLINGER, Assist. U. S. Attorney, A. W. GREGG, Solicitor of Internal Revenue, and THOMAS H. LEWIS, JR., Special Attorney, Bureau of Internal Revenue, of Counsel.)

THACHER, *D. J.*: Julia Seligman, a resident of New Jersey, died on or about the 28th day of March, 1921. Among the assets of her estate were the following: Real estate in New York State of the value of $160,000; personal jewelry in New York State of the value of $61,500. Under the terms of her will the New York real estate was devised to a named devisee, and the jewelry was bequeathed to named legatees. The will

granted to her executors the power to sell real estate, and directed that all transfer and inheritance taxes should be paid from the residuary estate. The executors paid the New York transfer taxes upon the transfer of the real estate and jewelry, and in making return of the net income of the estate for Federal income tax purposes deducted the amount thereof. This deduction was disallowed, additional taxes were assessed, and these taxes were paid under protest. The sole question presented for decision is whether or not such taxes are deductible in estimating the net income of the estate under the Revenue Act of 1921.

In *Keith* v. *Johnson*, 3 Fed. (2d) 361, the Circuit Court of Appeals in this circuit has decided that New York transfer taxes imposed upon the transfer of personalty not specifically bequeathed are deductible by the executors of the estate in making return of the net income of the estate under the income tax provisions of the Revenue Act of 1918 [1916-1917 Act]. The question whether such taxes, based upon the transfer of real estate or of personal property specifically bequeathed, might thus be deducted, was not decided in that case, and was expressly reserved in the opinion of the court. The questions there reserved now arise for decision under the Revenue Act of 1921. Section 219 of that Act provides: "(a) The tax imposed by Sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including (1) Income received by estates of deceased persons during the period of administration or settlement of the estate . . . (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 212, except (the exceptions being inapplicable in this case)." By Sections 210 and 211, normal taxes and surtaxes are imposed upon "the net income of every individual." The term "net income" as defined in Sec-

tion 212 is the gross income as defined in Section 213, less the deductions allowed by Section 214. Among the deductions allowed by Section 214 is the following: "(3) Taxes paid or accrued within the taxable year except (the exceptions being inapplicable here) . . . For the purpose of this paragraph estate, inheritance, legacy and succession taxes accrue on the due date thereof, except as otherwise provided by the law of the jurisdiction imposing such taxes."

It is insisted in behalf of the Government that the New York transfer tax paid upon the transfer of personal property included in a specific legacy, or upon the transfer of real estate, must be excepted from the rule in *Keith* v. *Johnson, supra,* because it is contended that when such taxes are paid by the executor they are not paid for the account of the estate or entity upon which the Federal income tax is levied, and therefore are not deductible in determining the net income which is the basis of the tax. In support of this contention it is claimed that in the case of a legacy of specific personal property the executor may require payment of the amount of the tax from the legatee before delivering the legacy, and that in the case of a legacy charged upon or payable out of real property he may require payment from the heir or devisee. (Section 224 of the Tax Law of the State of New York.) In each case it may be said the beneficiary receives specific property, and is obligated to pay the executor the transfer tax thereon. Because specific property is received without deduction of the tax it is argued that the tax when paid by the executor is not paid for the account of the estate, but for the account of the legatee.

The argument is plausible, but I believe unsound, because it rests upon the form, not upon the substance, of the transaction. In its consideration the court is bound by decisions which while not deciding the precise point here in question are in their logical implications of controlling significance. In *U. S.* v. *Perkins,* 163 U. S. 625,

it was held that a legacy to the United States was subject to the New York transfer tax upon the theory that the tax was not a tax upon the legacy, but was "in reality a limitation upon the power of the testator to bequeath his property to whom he pleases; a declaration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a certain condition that the state has a right to impose. . . . Thus, a tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee." In *Prentiss* v. *Eisner*, 267 Fed. 16, following the reasoning in *U. S.* v. *Perkins*, supra, it was held that a legatee could not deduct the New York inheritance tax upon his Federal income tax return. In *U. S.* v. *Woodward*, 256 U. S. 632, it was held that Congress did not intend to except Federal inheritance taxes deductible under the income tax provisions of the Revenue Act of 1918, and that such taxes were deductible by the executors in making return of the income of the estate. In *Home Trust Co.* v. *Law*, 204 App. Div. 590 (affd. 236 U. S. 607), the New York inheritance tax was allowed a deduction in computing the net income of a decedent's estate under the provisions of the New York income tax law, which are substantially similar to the provisions of the Federal income tax law. In that case the court regarded the State transfer tax and the Federal estate tax, although differing in respect to the rates charged, the exemptions permitted and the deductions authorized, as well as in other particulars, as of the same intrinsic nature and purpose, and it was concluded "that since the one tax is deductible from the gross revenue to determine the taxable net income of an estate under the Federal law, the other tax should be held to be deductible to determine the taxable net income of an estate under the state law." As already

noted, in *Keith* v. *Johnson,* supra, the Circuit Court of Appeals of this circuit held that the New York transfer tax paid by the executors upon the transfer of personal property not specifically bequeathed is deductible by the executors in estimating the Federal income tax upon the estate.

The New York transfer tax is neither a tax on the property or donee, and so far as the donee is concerned he does not pay a tax, but receives his legacy or devise diminished by the amount of the tax which is deducted therefrom. Judge A. N. Hand, writing in *Prentiss* v. *Eisner,* in this court (260 Fed. 589), said:

> "To say that the legatee, devisee, heir, or distributee receives the property without any deduction and then pays the tax is really a most artificial way of viewing the transaction. In the case of personal property he really only gets the balance, with a credit as a matter of convenient bookkeeping to the amount of the tax. In the case of real estate he receives properly speaking an equity. He can pay the tax and get the land freed from the incumbrance, or the state can foreclose the lien and he will receive the balance. In either case the only natural way to treat him is as a recipient of a net amount. The condition of the devolution of the property is the receipt of the transfer tax by the state."

So far as the executors are concerned, their payment to the State of this deduction from the principal of the gift is regarded as the payment of a tax which they may deduct from the income of the estate. However illogical it may seem to thus treat the tax as a deduction from the principal of the legacy and at the same time to treat it as an expenditure chargeable to the income of the estate, this seems to be the law under the statute and the decisions construing it, at least to the extent of deductions made from cash legacies under Section 224 of the New York Tax Law. If there be il-

logic in this, it does not result from any inconsistencies in the decisions, but from the statute itself, which allows deductions from the gross income of all taxes paid within the year, including inheritance and transfer taxes. (U. S. *v.* Woodward, 256 U. S. 632.) This construction of the Revenue Act of 1918 is confirmed in the Revenue Act of 1921, which in terms recognizes that such taxes may be deducted in defining the time of their accrual. (See Section 214 (3) of the Revenue Act of 1921.) Since it is the law, in this court at least, that New York inheritance taxes upon general legacies are deductible, there can be no reason in excepting from this rule taxes upon the transfer of real estate or personalty specifically bequeathed, unless the exception is to be based, not upon the nature of the tax or the obligation to pay it, but merely upon the form which the transaction necessarily takes, so that the identity of specific property may be preserved. The nature of the tax is not changed by the fortuitous circumstance that the property is transferred in kind, or that the amount of the tax is refunded to the executor instead of being deducted by him before delivery of the legacy. In contemplation of law there are no distinctions except in form between the two transactions, and these distinctions are not recognized in the statute permitting the deduction. In providing for the deduction of "taxes paid within the taxable year" the statute in an excepting clause enumerates what taxes are to be excepted, which implies a purpose not to except others. (*U. S.* v. *Woodward*, 256 U. S. 632.) Such taxes as those here in question are not within the exception and the courts cannot add exceptions to those specifically enumerated by Congress. The executors were required to pay the taxes as an incident in the administration and settlement of the estate. They were paid, not for the account of the devisee and legatees, but in reality for the decedent's account as a tax upon her right to transmit. If paid by the decedent during her lifetime, there would

be no question of her right to deduct, and being imposed upon her act of transfer consummated by her death it is not without reason to permit, as the statute does, the deduction by her executors, regardless of the form in which the property passes to her legatee and devisees. The statute permitting the deduction, the nature of the tax deducted, and the obligation to pay it imposed upon the executors being precisely the same as in *Keith* v. *Johnson, supra,* I can see no reason in refusing to apply the rule of that case to the taxes here involved.

The motion of the plaintiff is therefore granted, and the motion of the defendant is denied.

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a. f. 3 518 U. S. BOARD OF TAX APPEALS.

Appeal of FARMERS' LOAN & TRUST COMPANY.

DOCKET No. 1399.

Administrator, Estate of Nathaniel Whitman.

The taxpayer as administrator made return and paid tax on the transfer of the estate of Nathaniel Whitman in the year 1919 and claims the right to deduct the said tax from its return of income for the estate for the period in which the tax was paid. *Held,* that the New York state transfer tax was a proper deduction from income of an estate and that said tax is not deductible by the beneficiaries thereof.

Submitted March 18, 1925. Decided November 20, 1925.

RUSSELL BRADFORD, ESQ., *for the taxpayer.*
E. C. LAKE, ESQ., *for the Commissioner.*
Before JAMES, LITTLETON, SMITH and TRUSSELL.

This is an appeal from the determination of a deficiency in income tax for the taxable period beginning January 8, 1919, the date of the death of the decedent,

and ended December 31, 1919. The amount of the deficiency is $4,498.86.

The sole question involved in the appeal is whether the New York State transfer tax may be deducted in the determination of the net income of an estate.

FINDINGS OF FACT.

Nathaniel Whitman died a resident of the State of New York on January 7, 1919, leaving a will in which he appointed one Arthur L. Lasher as sole executor. The said Lasher acted as executor of the estate until on or about February 18, 1919, when the petitioner in this appeal, the Farmers Loan and Trust Company, was appointed as administrator with the will annexed, of the estate.

Said Lasher, on July 10, 1919, paid a transfer tax upon the estate to the Comptroller of the State of New York in the amount of $121,120.07. Under date of June 10, 1921, the Surrogates Court of New York County made final determination of the value of the estate of Nathaniel Whitman, said value being fixed at $2,500,-312.45, upon which a transfer tax was assessed in the amount of $127,494.81, which tax was satisfied by the payment above mentioned because of the five per cent discount remitted under New York state law for payments within six months of the date of death.

Nathaniel Whitman died seized of real estate in New York valued at $518,200, of which $87,000 in amount was specifically devised and the tax upon which amounted to $6,496.03. The decedent further provided in his will for the conversion by the executors of all the rest and residue of his estate into cash.

Arthur L. Lasher, as executor of the estate of the decedent, made and filed in due course the income tax return of that estate for the period from the date of the death of the decedent to the end of the taxable year 1919. In making that return he did not claim as a deduction the amount of inheritance or transfer tax paid to the

State of New York. The Commissioner made other adjustments not here material or in question, and from his refusal to offset against such adjustments the transfer taxes above set forth and his determination of a deficiency consequent thereon, the taxpayer brings this appeal. The return of the estate was on the cash basis and the books were so kept.

DECISION.

The deficiency determined by the Commissioner is disallowed.

OPINION.

JAMES: The question involved in this appeal requires the construction of sections 210, 211, 214 (a) (3) and 219 (a) and (b) of the Revenue Act of 1918, and Article 10 of the Tax Law of the State of New York, being the article dealing with the subject of taxable transfers.

Sections 210, 211 and 219 of the Revenue Act of 1918 imposed taxes upon individuals, estates and trusts at rates therein named. Section 214 of that act provides in part as follows:

> "Sec. 214. (a) That in computing net income there shall be allowed as deductions:
> * * * * * * * *
> "(3) Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, * * * or (c) by the authority of any State or Territory, * * *"

Section 219 of that act provides in part:

> "Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—
> "(1) Income received by estates of deceased

persons during the period of administration or settlement of the estate;

* * * * * * * *

"(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except * * *"

It appears from the foregoing that under the Revenue Act of 1918, a tax is imposed upon the net income of an estate, during the period of administration or settlement, in the same manner as upon other taxable persons and with the same definition of gross and net income and the deductions allowable from gross income in ascertaining the amount of net taxable income. Inquiry here, therefore, is whether the New York State transfer tax paid by the estate of the decedent represented in this appeal, may be taken as a deduction in ascertaining the net taxable income of that estate. The question turns upon whether the estate of Nathaniel Whitman was the taxable entity which paid the New York State transfer tax in the year 1919. The solution of this question turns upon the nature of the tax so paid as defined by the statutes of that state as interpreted by the courts of the United States and of the State of New York.

Section 220 of the New York Tax Law provides, so far as is material, as follows:

"TAXABLE TRANSFERS. A tax shall be and is hereby imposed upon the transfer of any tangible property within the state and of intangible property, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

"1. When the transfer is by will or by the intestate laws of this state of any intangible property, or of tangible property within the state, from any

person dying seized or possessed thereof while a resident of the state."

Section 221 (a) provides the rates of tax which are based upon the amount of the legacies, bequest or inheritance of each individual beneficiary. Section 222, so far as is material to this matter, reads as follows:

> "ACCRUAL AND PAYMENT OF TAX. All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the state comptroller in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said state comptroller or county treasurer shall give, and every executor, administrator or trustee shall take, duplicate receipts from him of such payment as provided in section two hundred and thirty-six."

Section 224 provides for the method of collection of the tax and the persons responsible for its payment. It reads as follows:

> "LIEN OF TAX AND COLLECTION BY EXECUTORS, ADMINISTRATORS AND TRUSTEES. Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same

manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

Section 225 reads in full as follows:

"Refund of Tax Erroneously Paid. If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such a legacy or distributive share, and such person is required by order of the surrogate having

jurisdiction, on notice to the state comptroller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the state comptroller or county treasurer; or if such tax has been paid to such state comptroller or county treasurer, such officer shall refund out of the funds in his hands or custody to the credit of such taxes such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this article. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state comptroller, the state comptroller shall, if such tax was paid in a county in which the office of appraisor is salaried, refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in his hands or custody to the credit of such taxes, and to credit himself with the same in the account required to be rendered by him under this article, or if paid in a county in which the office of appraisor is not salaried, he shall by warrant direct and allow the county treasurer of the county to refund such amount in the same manner; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled

to any interest upon such refund, and the state comptroller shall deduct from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. This section, as amended, shall apply to appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect."

Section 236 also contains significant provisions with respect to the duty for the payment of the tax and reads as follows:

"RECEIPTS FROM COUNTY TREASURER OR COMPTROLLER. One of the duplicate receipts issued for the payment of any tax under this article, as provided by section two hundred and twenty-two, shall be countersigned by the state treasurer if the same was issued by the state comptroller, and by the state comptroller if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person; but no executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original. * * *

Section 243 entitled "Definitions" contains a significant definition of the word "transfer" in the following language:

> "* * * The word 'transfer', as used in this article, shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. * * *"

At the outset it must be understood that the deductions permitted by section 214 (a) (3) of the Revenue Act of 1918 for taxes imposed by the authority of any state does not purport to permit the deduction of any taxes except those which are paid because they are obligations of the taxpayer. The section provides that "taxes * * * imposed * * *" may be deducted. To be deductible from income, therefore, the tax here in question must be imposed upon the estate or on its personal representative. It is not enough that the personal representative may be made the conduit through which, or through whom, the tax passes to the state. Since the estate is the Federal income taxpayer it must, if it may lawfully claim this deduction, also be the State transfer tax taxpayer.

The question here at issue has been before the Circuit Court of Appeals of the Second Circuit in the case of *Keith* v. *Johnson,* 3 Fed. (2nd) 361, and before the Court of Appeals of the State of New York in *Home Trust Company* v. *Law,* 236 N. Y. 607, 142 N. E. 303, affirming a decision of the Appellate Division reported in 204 A. D. 590, 198 N. Y. Supp. 710.

In the case of *Keith* v. *Johnson,* the issue was identical with that in this appeal. The Court at the beginning of the opinion quotes section 224 of the tax law as follows:

> "The tax shall be 'a lien upon the property transferred * * * and the executors * * * of every

estate so transferred shall be personally liable for such tax until its payment.' "

Referring to section 224, set out in full above, for the portion quoted, we find that the first sentence of that section reads in full as follows:

> "*Every such tax* shall be *and remain* a lien upon the property transferred *until paid and the person to whom the property is so transferred*, and the executors, *administrators and trustees* of every estate so transferred shall be personally liable for such tax until its payment." (Italics indicate omitted portions, and are ours.)

Reasoning from the section as quoted by it, the Court holds that the tax is imposed upon the executor, which is true, but it is also true that in the same sense the tax is imposed both upon the property transferred and the person to whom it is transferred. It would appear that there is nothing in Section 224 which is determinative of the question here at issue. Throughout the provisions of sections 221, 224, 225, and 236, dealing with the collection of the tax, there is no intimation as to the particular entity upon which the tax *per se* is imposed. In fact, section 220 makes it perfectly clear that the tax is imposed upon an event, namely, "the transfer of any tangible property within the state and of any intangible property, or of any interest therein or income therefrom, in trust or otherwise to persons or corporations in the following cases. * * *"

The Court also in *Keith* v. *Johnson* relies upon the above case of *Home Trust Company* v. *Law*, to which reference in detail will be made later in this opinion.

The Commissioner contended in *Keith* v. *Johnson*, and in the instant appeal contends, that the tax is a proper and allowable deduction from the income of the devisee or heirs-at-laws when paid, notwithstanding the decision of *Prentiss* v. *Eisner*, 267 Fed. 16 [U. S. Tax Cases 413].

Finally, it is apparent that the court had considerable difficulty in deciding that a New York state transfer tax imposed upon the transfer of real estate was a tax upon the estate, since, strictly speaking, real property left under a specific devise never comes into the hands of the executors or administrators but passes direct to the heirs upon whom is placed the direct burden under section 224 of paying the tax upon the real property to the executor, who is charged with the duty of paying the tax in the first instance to the state. So serious did the court apparently consider this question that it concluded the opinion with the words, "We express no opinion as to the result in the cases of realty, where the executor is not the successor, or even in the case of specific legacies." It must be apparent that if the New York state transfer tax is deductible by any interest, either the estate through the executor or the legatees or heirs, it must be deductible as an entirety and not in parcels depending on the particular manner of the devolution of the property. Any other rule would be so impossible of administration as to indicate clearly that there could have been no Congressional intent to provide so complicated a method of deducting it. Consider for instance a legatee receiving real estate, a specific bequest, and a share in the residuary estate, which latter comprises both real and personal property. The New York transfer tax, like most inheritance taxes, is graduated both by the degree of relationship of the legatee or heir and by the amount of property received. The tax is computed on the aggregate amount of the transfer. In a case such as that supposed, if the intimation of the Court should lead to a separation, the person attempting to compute the proper deduction by the estate and by the legatee would be forced to determine how much of the transfer tax imposed in bulk was imposed (1) upon a specific legacy, (2) upon the real property passing direct, (3) upon the real and personal property comprising the legatee's share of the residuary

estate, and to make the matter more complicated, we may assume that a satisfactory division among all the shares in the residuary estate was arrived at and they took undivided interests in the real property included therein.

The Court of Appeals wrote no opinion in *Home Trust Company* v. *Law*. The Appellate Division of the Supreme Court, however, wrote a carefully considered opinion, in which it held that under the New York State income tax law, imposed under provisions of law almost identical with those of the Federal law, the transfer tax was properly deductible from the income of the estate and not from the income of the individual legatees and devisees or heirs. After discussing a number of New York cases to which reference is made below, the Court said:

> "The transfer tax payment is made by the executor from the funds of the estate. * * * The tax is measurable, not by the funds received by a legatee, but by the funds the executor receives. As the burden of paying the income tax, as well as the burden of paying the transfer tax, is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax Law measurable by gross income received, less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself pays."

We believe the foregoing states succinctly the sound basis for the determination in this appeal. It is not that the tax is made a burden upon the executor or the estate as such of the legatees, devisees or heirs as such, but that primarily the state looks to the executor and to the estate for the payment of the tax. Being a tax measured, unlike the Federal estate tax, by the amount transferred to each individual beneficiary, the New York transfer tax has quite properly provided the machinery whereby each individual beneficiary receives

his share diminished by the tax upon that share. But this does not necessarily mean that the tax is either paid by the beneficiary or imposed upon him. He receives his legacy diminished by a tax subtracted therefrom before his right attaches, although measured by the legacy itself. *In re Swift's Estate,* 137 N. Y. 77, 32 N. E. 1096; *In re Penfold's Estate,* 216 N. Y. 163, 110 N. E. 497; *In re Merriam's Estates,* 141 N. Y. 479, 36 N. E. 505, affirmed in the Supreme Court of the United States under the title of *United States* v. *Perkins,* 163 U. S. 625 [Supp. U. S. Tax Cases 993].

The last case above mentioned involved a legacy left by Merriam to the United States and included both real and personal property. It is much relied upon by the taxpayer in this appeal, as indicating that the tax is upon the estate both because of the language in the decision of the New York Court of Appeals and because of the language of the United States Supreme Court and upon what it assumes to be a corollary that to hold that the tax is one imposed upon the devisee would involve a constitutional question by reason of the fact that the property of the United States is exempt from state taxation. Whether this is so as applied to legacies left to the United States may well be doubted, since the United States does not take in its capacity as a Government but in its capacity as a corporation.

In *Merriam's* case, the Court of Appeals said:

> "For the purpose of receiving legacies, and for many other purposes, the United States is to be regarded as a body politic and corporate."

In *South Carolina* v. *United States,* 199 U. S. 437 [Supp. U. S. Tax Cases 984], the Court said:

> "Further, it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes

sustained in *United States* v. *Perkins*, 163 U. S. 625 [Supp. U. S. Tax Cases 993]."

This decision, while not controlling the question before us, indicates that the thought has been that:

> "The exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business." (199 U. S. 461.)

In *United States* v. *Perkins*, the Court said:

> "The so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. * * * Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * *
>
> "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution of the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

We come now to consider some of the cases cited by the Commissioner which seem at first glance to indicate a conflict in the New York decisions as to the nature of the New York tax. *In re Hoffman's Estate*, 143

N. Y., 327, 38 N. E. 311, involved the method of computing the statutory exemption of $10,000, that is, whether the said exemption applied to the individual shares or to the estate as a whole. In this case there was a life estate created for the mother of the testatrix, a further life estate to her daughter, and the remainder to her issue under certain contingencies. The Court held that there was one exemption of $10,000 and used language which seemed to indicate that the tax was upon the recipient, particularly the following language. "There are some changes of phraseology in the more important sections, but I think it remains true that the tax is one upon the right of succession, *levied upon successors in respect to the shares to which they succeed, and not upon the decedent's estate as such.*" (Italics ours.) It is manifest that the above italicized portion of the quotation of the decision is dictum wholly unnecessary to the decision in the case and quite without reflection upon the result arrived at. If the Court had said in the place of the italicized portion, "measured by the shares passing to the beneficiaries," the sense would be substantially the same in so far as it is necessary to a decision, and the case would be in agreement with the major line of New York authority.

In re Westurn's Estate, 152 N. Y. 93, 46 N. E. 315, is a case involving the method of computing the taxable estate. Since the New York transfer tax is measured by the shares passing, it necessarily follows that the law does not contain, as does the Federal estate tax law, provision for the computation of a gross estate from which the debts of the decedent and the costs of administration are deductible. In *Westurn's* estate, an expensive contest over a will resulted in unusually large costs of administration, and the question involved was whether, in computing the value of the shares passing, these expenses of administration were deductible. The real decision in the case is contained in the following language:

"The real interest passing is what remains after payment of debts and other charges. It is plainly inferable from section 225 of the act that the debts of the decedent are to be deducted in arriving at the valuation of the property and in fixing the tax. That section authorizes a proportionate amount of a tax to be refunded in case debts against the estate shall be proven after the tax shall have been paid."

But the Court also said:

"The principle that the tax is a succession tax imposed as a burden *on each person claiming succession, measured by the value of his interest and collectible out of his interest only, was reaffirmed in the case of In re Hoffman's Estate.* * * *" (Italics ours.)

That language was also quite unnecessary to the decision of the case, and was obviously used by the Court in the most general sense.

In re Gihon's Estate, 169 N. Y. 443, 62 N. E. 561, involved the propriety of the deduction of costs of temporary administration. The court held that the deduction was proper before computing the value of the taxable interests transferred, and again the Court used language which, taken out of its setting, seems to indicate that the tax is imposed upon the legatee. The case also involved the question whether the Federal inheritance tax of 1898 was deducible in determining the value of the taxable transfer under the New York law. In holding that this tax could not be deducted, the Court said:

"In our judgment, the vital error of this argument lies in the assumption that the 'taxes are primarily payable out of the estate.' The federal tax is exactly of the same nature as the state tax,—a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property. * * * The federal tax is

necessarily of this character; for a direct tax, unless apportioned according to population, would be repugnant to the constitution of the United States. Under that statute, also, it is the amount of the legacy, not of the estate, that determines the rate of taxation. Therefore, though the administrator or executor is required to pay the tax, *he pays it out of the legacy for the legatee, not on account of the estate.*" (Italics ours.)

But the same result would have been arrived at in the foregoing case had the Court contented itself with saying that both taxes were imposed simultaneously and both upon the shares in the estate actually transferred undiminished on account of any tax upon the transfer, upon the succession or upon the inheritance or by whatever name it happened to be described.

In *New York Trust Company* v. *Eisner,* 256 U. S. 345 [U. S. Tax Cases 370], the same confusion of thought appears where the Court says:

> "* * * if the tax attaches to the estate before distribution—if it is a tax on the right to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. 'Charges against the estate' as pointed out by the Court below, are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only the New York succession tax but those paid to other states, which can stand no better than that paid in New York. What amount New York may take as the basis of taxation and questions of priority between the United States and the state are not open in this case."

Again the same conclusion would have been arrived at by holding that the taxes attached simultaneously on account of the transfer or succession and were not to be computed with reference to one another.

Knowlton v. *Moore*, 178 U. S. 41 [U. S. Tax Cases 289], involving the constitutionality of the Federal inheritance tax of 1898 as imposed by the War Revenue Act of that year is a most instructive decision as bearing upon the nature of inheritance, succession, transfer and estate taxes. While the actual decision of the Court in that case is not of great importance in this appeal, some of the language is helpful and significant as to the general nature of inheritance, succession, transfer and estate taxes. Thus the Court says (pp. 55, 56):

> "Thus, looking over the whole field, and considering death duties, in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, of the transmission from the dead to the living, on which such taxes are more immediately rested."

And on page 57:

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce miscon-

ception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances being assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammeled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view, being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. The authorities which maintain this doctrine have been already referred to in the citation which we have made from *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288 [U. S. Tax Cases, 2nd Supp. 1368]. An illustration is found in *United States* v. *Perkins*, 163 U. S. 625 [Supp. U. S. Tax Cases 993], where the right of the State of New York to levy a tax on a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions. Some state courts, on the other hand, have held that, despite the power of regulation, no greater privilege of taxation exists as to inheritance and legacy taxes than as to other property. *Cope's Appeal*, 191 Penn. St. 1; *State* v. *Ferris*, 53 Ohio St. 314; *State* v. *Gorman*, 40 Min. 232; *Curry* v. *Spencer*, 61 N. H. 624. In *State* v. *Switzler*, 143 Missouri 287, the power of the legislature of Missouri to levy a

uniform tax upon the succession of estates was conceded, though such tax was declared not to be a tax upon property in the ordinary sense. The court nevertheless held that the particular tax in question, which was progressive in rate, was invalid, because it violated a provision of the state constitution; the decision, in effect, being that because the legislature and the power to regulate successions, it was not thereby justified in levying a tax which was not sanctioned by the state constitution.

"All the courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress."

We conclude, therefore, that the New York state transfer tax at least is a tax which is primarily imposed upon the transfer of an estate, the taxable portion and the rate of tax being measured by the value of the several transfers made, the executor or administrator being primarily the medium for the payment of the tax, and the tax being in the first instance payable out of the taxable shares in the estate before they are transferred. The tax is, we believe, deductible from income of the estate and not from that of the individual beneficiaries. In arriving at this conclusion, we confess some difficulty in determining that the tax is imposed upon any entity whatever in a strict sense since it is imposed really upon the happening of an event and is a true excise tax rather than a tax strictly either *in personam* or *in rem*. But excise taxes, for instance stamp taxes paid upon deeds or other instruments by an executor, would clearly be included in the category

of taxes which might be deducted in determining the net income of an estate.

The real confusion, we believe, in the New York cases and in some of the others to which reference has been made, arises from the difficulty of finding precise language to define the nature of a tax when the exact issue before the Court does not require a precise definition. In the decisions themselves we do not find conflict. We find it only in the language used by the Courts. Apparently there is a confusion under the New York law between the imposition of the tax and its incidence, and this confusion is notably found in the brief filed by the Commissioner in this appeal. Thus the Commissioner says:

> "These results necessarily follow the provisions of the New York Inheritance Tax Act. Each legatee is personally liable for the tax on his legacy. The Executor deducts the amount of the tax, not from the estate, but from the legatee's share, and if the legacy or distributive share is not in money the executor is required to collect the tax thereon from the person entitled thereto and he cannot be compelled to deliver the property until the legatee has paid the tax thereon. In the event that there are several succeeding estates in the same property the Court is empowered to apportion the tax amongst the several tenants and to determine the amount to be paid into the Executor's hands by each of them (Section 224). Manifestly these provisions are intended to impose the burden of this tax upon such legacy. They are entirely inconsistent with any idea that the burden of the tax is to fall upon the 'estate.' It is true that the estate must in the first instance pay the tax, but the incidence of the tax is not determined by its payment where the person paying is entitled to reimbursement. The incidence of the tax is determined by the ultimate liability. Under the New York Act the legatee is ultimately liable for the tax. He must pay it before he can receive his legacy. In the event

> that the estate proves insufficient to pay debts and the legatee is compelled to refund a part of his legacy he is entitled to recover from the tax commission a pro rata part of the tax paid. (Section 226.) Manifestly if the ultimate liability is not upon the legacy the recovery of the overpaid tax would be by the Executor as the representative of the estate, and not by the legatee."

But if this reasoning is sound and the incidence of the tax is to be the determining factor as to the entity by which it may be deducted from income, then the Commissioner's case falls entirely in respect of the entity which may properly deduct the Federal estate tax from an income tax return. Under the New York law the Federal estate tax has been held to be a charge upon the residuary estate, *In re Hamlin*, 226 N. Y. 407, 124 N. E. 4, and the residuary legatees receive their shares necessarily diminished on account of the imposition of the tax. If the incidence of the tax is a measure of its deductibility, then the decision in *United States* v. *Woodward*, 256 U. S. 632 [U. S. Tax Cases 580] was erroneous. The argument proves too much, and really has no bearing upon the precise question here under consideration.

> "These donees do not pay the taxes any more than they pay the funeral expenses, the lawyers, the executors and the testator's debts." *Y. M. C. A.* v. *Davis*, 264 U. S. 47 [U. S. Tax Cases 2d Supp. 1583], p. 51.

We are of the opinion that the taxpayer in this appeal is entitled to a deduction on account of the transfer tax paid to the state of New York in the year 1919, and the deficiency determined by the Commissioner herein must be disallowed.

U. S. BOARD OF TAX APPEALS.

Docket No. 442.

Appeal of EDGAR MUNSON, Executor of the Estate of HARRIET A. CURTIS, *Deceased*.

The New York State transfer tax paid by the executor of the estate of a decedent is a legal deduction from gross income in the income-tax return filed for the decedent's estate in the process of settlement for the year in which such tax was paid, under the provisions of section 214(a)(3) of the Revenue Act of 1918.

RUSSELL L. BRADFORD, ESQ., for the taxpayer, ROBERT A. LITTLETON, ESQ., for the Commissioner. Submitted January 17, 1925. Decided December 1, 1925.

Before LANSDON, LITTLETON and SMITH.

This appeal is from the determination of a deficiency of $3,036.03 in income tax for the year 1920 of the estate of Harriet A. Curtis, deceased. From the pleadings and documentary evidence introduced, the Board makes the following

FINDINGS OF FACT.

1. Edgar Munson is the sole surviving executor of the estate of Harriet A. Curtis, deceased. As such executor, he made an income-tax return for the estate for the year 1920, which showed a total income of $30,196.47. From the gross income the executor claimed a deduction of $33,611.45, which represents the amount of the New York State transfer tax paid by him as executor of the estate of the decedent to the Comptroller of the State of New York on July 23 and July 24, 1920. The return showed no net income. The Commissioner amended the return by disallowing the

deduction of the $33,611.45 transfer tax paid. The deficiency in tax is due to such disallowance.

DECISION.

The deficiency determined by the Commissioner is disallowed.

OPINION.

SMITH: This appeal raises the single question of the right of an estate in the process of settlement in 1920 to deduct from the gross income shown in an income tax return of the estate for 1920 the New York transfer tax paid by the executor during the year. In accordance with the provisions of section 219 of the Revenue Act of 1918, the executor of the estate of Harriet A. Curtis, deceased, filed an income-tax return of the income of the estate for which he was acting for the calendar year 1920 and deducted from the gross income $33,611.45, which is the amount of the New York transfer tax paid by him on July 23 and July 24, 1920. This deduction was made under the provisions of section 214(a) of the Revenue Act of 1918, which permits the deduction from gross income of

> "(3) Taxes paid or accrued within the taxable year imposed * * * (c) by the authority of any State or Territory * * * not including those assessed against local benefits of a kind tending to increase the value of the property assessed * * *."

The Commissioner has disallowed the deduction on the ground that the New York transfer tax is imposed not upon the estate of the decedent but upon the heirs, legatees, or devisees; that the tax which is paid by the administrator or executor is paid by him only as agent; and that the tax is a legal deduction from the gross income of the distributees only for whom it is paid. (I. T. 1474, C. B. I-2, p. 103.)

The New York transfer tax is imposed by section

220 *et seq.*, of the New York Tax Law. In section 220 it is provided:

> "A tax shall be and is hereby imposed upon the transfer of * * * property * * * to persons or corporations in the following cases, * * *
>
> "(1) When the transfer is by will or by the intestate laws of this state, * * *
>
> "(4) When the transfer is * * * by deed * * * intended to take effect in possession or enjoyment at or after such death. * * *
>
> "(8) The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed."

Section 224 of the tax law reads in full as follows:

> "224. *Lien of tax and collection by executors, administrators and trustees.* Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee

shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require." (Thus amended by L. 1921, chap. 476, in effect July 1, 1921.)

The obligation for the payment of the tax is placed upon the executor, administrator or trustee. He is authorized to sell so much of the property of the decedent as will enable him to pay the tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. If a legacy be money, the executor shall deduct from the legacy such portion of the transfer tax paid or payable by him as is properly apportionable to the legacy; if the legacy is in some other form of personal property than money, the executor shall collect from the legatee the amount of the transfer tax properly apportionable to the legacy and shall not pay over to the legatee the bequeathed property until the transfer tax has been paid; if the testator has devised real property the executor shall collect from the devisee the portion of the total transfer tax properly apportionable to the real estate in question, and the tax shall remain a lien upon the real property until it is paid. If the decedent is an intestate, the

transfer tax is collected from the heirs in a similar manner.

Is the New York transfer tax thus payable by the executor, administrator or trustee such a tax as is comprehended by the words "taxes paid or accrued" contained in section 214 (a) (3) of the Revenue Act of 1918? These words are comprehensive. They include all taxes except those specifically excepted. In *United States* v. *Woodward* (1921), 256 U. S. 632, 634 [U. S. Tax Cases 580], the United States Supreme Court said, relative to the words "taxes paid or accrued within the taxable" year as follows:

> "This last provision is the important one here. It is not ambiguous, but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include *every* tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be expected. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones particularly excepted." (Italics ours.)

At the time of the enactment of the Revenue Act of 1918 the New York transfer tax was as well known as the Federal estate tax; the latter was not enacted until September 8, 1916, whereas the New York transfer tax has been upon the statute books continuously from 1885. We do not think that it can be doubted that the New York transfer tax is a tax comprehended by the words "taxes paid," as used in section 214 (a) (3) of the Revenue Act of 1918.

If the New York transfer tax is deductible from the gross income of some taxpayer, from the gross income of what taxpayer is it deductible? It clearly is not deductible from the gross income of the decedent, for it

was neither paid nor accrued during the decedent's lifetime. It is deductible from the gross income of the beneficiary of the estate or is it deductible from the gross income of the estate as a taxable entity when paid by the executor, administrator or trustee during the period of settlement? The Commissioner formerly held that the tax was not a legal deduction from the gross income of a legatee or beneficiary. This was upon the theory that the amount paid as transfer tax was not in reality a *tax*. The question whether it was deductible from the gross income of the legatee or beneficiary was before the courts in the case of *Prentiss* v. *Eisner*, 260 Fed. 589, affirmed 267 Fed. 16 [U. S. Tax Cases 413]. The higher court held that the New York transfer tax was not a deduction from the income of the legatee of an estate on the ground that it was not paid by the legatee nor was the tax paid on his or her behalf. It held that the New York transfer tax is one imposed upon the right to dispose of property. This was in accordance with the decision of the United States Supreme Court in the case of *United States* v. *Perkins*, 163 U. S. 625 [Supp. U. S. Tax Cases 993], and the court said that, until the Court of Appeals of New York took a different view of the New York transfer tax from that taken by the Supreme Court of the United States in the above mentioned case, it would follow that decision. A writ of certiorari for a review of the decision of the Circuit Court of Appeals in the case of *Prentiss* v. *Eisner*, was denied by the United States Supreme Court in 254 U. S. 647.

Thereafter the United States Supreme Court rendered its decision in *United States* v. *Woodward*, *supra*, and held that the Federal estate tax was a *tax* within the meaning of the words "taxes paid," contained in section 214 (a) (3) of the Revenue Act of 1918. Thereupon, the Commissioner reached a conclusion that the New York transfer tax was also a tax deductible from gross income in an income-tax return, but held that

it was deductible from the gross income of the beneficiary and not from the gross income of an estate in process of settlement (I. T. 1474, C. B. I-2, p. 103), thus rejecting the decision of the courts in *Prentiss* v. *Eisner, supra.*

In the *Matter of Merriam,* 141 N. Y. 479, the question of the nature of the transfer tax was squarely raised in New York. The decedent, William W. Merriam, bequeathed his estate to the United States and the question arose, naturally, whether the State of New York could levy a tax on the transfer to the United States. It was held by the Court of Appeals that the tax as imposed was rightly exacted. In the course of its opinion the court said (page 484):

> "This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession of property. This view eliminates from the case the point urged by the appellant, that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet, in contemplation of law, the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid."

This case was appealed to the United States Supreme Court under title of *United States* v. *Perkins,* 163 U. S. 625, 628 [Supp. U. S. Tax Cases 993], and that court upheld the right of the State of New York to impose the tax, saying:

> "Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right *to dispose of it* * * *." (Italics ours.)

After tracing the right of the State to impose restrictions on the transfer of property by descent or distribution, both in the common law and subsequent to the statute of wills enacted in the reign of Henry VIII, the court said (page 628):

> "In this view, the so-called inheritance tax of the State of New York is in reality a *limitation upon the power of the testator* to bequeath his property to whom he pleases; a declaration that, in the exercise of the power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury *before the bequest shall take effect.* Thus the tax is not upon the property, in the ordinary sense of the term, *but upon the right to dispose of it*, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee." (Italics ours.)

The Court of Appeals of the State of New York, as late as October 24, 1922 (234 N. Y. 175), in the *Matter of Hubbard*, in speaking of the New York transfer tax, said:

> "The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time."

We are not unmindful of the fact that there are a number of decisions of the courts of the State of New York, which speak of the New York transfer tax as a tax upon the legatee or beneficiary. Thus, in the case of *In re Gihon's Estate*, 169 N. Y. 433, 62 N. E. 561, the court said:

> "The federal tax [section 29 of the Revenue Act of June 13, 1898], is exactly of the same nature as the state tax,—a tax not on property, but on succes-

sion; that is to say, a tax on the legatee for the privilege of succeeding to property. *Knowlton* v. *Moore*, 178 U. S. 41 [U. S. Tax Cases 289], 20 Sup. Ct. 747, 44 L. Ed. 969. The federal tax is necessarily of this character; for a direct tax, unless apportioned according to population, would be repugnant to the constitution of the United States. Under that statute, also, it is the amount of the legacy, not of the estate, that determines the rate of taxation. *Therefore, though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. The requirement of the statute that the executor or administrator shall make the payment is prescribed to secure such payment, because the government is unwilling to trust solely to the legatee.* No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee. A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the legacy by the amount of the tax. * * * The full amount of the legacy is in law paid to the legatee, and the deduction made from it and paid to the state or federal government is paid on account of the legatee from the legacy which he receives. * * * " (Italics ours.)

This decision was under consideration by the United States Circuit Court of Appeals in the case of *Prentiss* v. *Eisner*, 267 Fed. 16 [U. S. Tax Case 413], and the court said relative to it and other cases:

"We admit that the New York cases on the subject of taxable transfers are confused and not always clear and consistent. But, until the New York Court of Appeals authoritatively states that the law of New York is not what the Supreme Court of the United States said it was in the *Perkins Case*, this Court has no alternative but to hold that the New

York Transfer Tax Act does not impose a tax on a legatee's right of succession which is deductible in her income tax return. The legacy which the plaintiff herein received under the will of her father did not become her property until after it had suffered a diminution to the amount of the tax, and the tax that was paid thereon was not a tax paid out of the plaintiff's individual estate, but was a payment out of the estate of her deceased father of that part of his estate which the state of New York had appropriated to itself, which payment was the condition precedent to the allowance by the state of the vesting of the remainder in the legatee."

In *Home Trust Co.* v. *Law* (1923), 204 App. Div. 590, affirmed by the Court of Appeals without opinion, 236 N. Y. 607, the question of the character of the New York transfer tax was squarely presented to the Appellate Division of the Supreme Court of New York. The question in issue was whether the New York transfer tax paid by the executor of an estate in process of settlement was deductible from the gross income of the estate in the state income-tax return filed for the estate by the executor. The New York State income tax law was patterned after the Federal income tax law, and in all respects here material was the same as the Federal income tax law. The Appellate Division held that the transfer tax was imposed upon the estate and was therefore deductible from the gross income of the estate in process of settlement. As above indicated, this decision of the lower court was approved without a written opinion by the highest court in the State of New York.

As above noted, the United States Circuit Court of Appeals, in *Prentiss* v. *Eisner, supra*, stated that it had no alternative but to hold that the New York transfer tax does not impose a tax upon a legatee's right of succession which is deductible in the legatee's income-tax return unless or until the New York Court of Ap-

peals authoritatively states that the law of New York is not what the Supreme Court said it was in the *Perkins Case, supra.* Since that time the New York Court of Appeals has held not that the New York transfer tax is otherwise than what it was construed to be in the *Perkins Case,* but has put its stamp of approval upon the proposition that the tax is on the right of the decedent to dispose of property by will or to transfer title to his heirs-at-law in case the decedent was an intestate. It is a cardinal principle of statutory construction that the interpretation of a state statute by the highest court of that state is controlling upon the Federal courts. *Massingill* v. *Downs* (1849), 7 How. 760; *Des Moines National Bank* v. *Fairweather* (1923), 263 U. S. 103; *Cudahy Packing Company* v. *Parramore* (1923), 263 U. S. 418.

The exact question in point in the appeal at bar has been decided in the case of *Johnson* v. *Keith,* 294 Fed. 964. In that case the United States District Court for the Eastern District of New York held that the New York transfer tax is a tax imposed on the right to dispose of property and that it is not until the property has yielded its contribution to the State that it becomes the property of the beneficiary, and hence that the tax is payable by the estate, and not by the beneficiary. This case was appealed to the United States Circuit Court of Appeals for the Second Circuit and, on November 21, 1924, the decision of that court was handed down affirming the decision below. The Circuit Court in this case said:

> "The case at bar therefore turns on whether the New York inheritance tax is 'imposed' on him. At least, if it is so imposed, section 5 covers him. That is a question of New York law, and we are bound by the decisions of the New York Court of Appeals on that question." *Keith* v. *Johnson,* 3 Fed. (2d), 361.

We have carefully considered the arguments of the Commissioner to the effect that the New York transfer

tax paid by an executor is not a legal deduction from the gross income of the estate in an income-tax return filed for the estate during the period of settlement. His principal argument appears to be based upon language used by the United States Supreme Court in the case of *New York Trust Company* v. *Eisner,* 256 U. S. 345 [U. S. Tax Cases 370]. That court held that the New York inheritance tax was not a deduction in calculating the net estate liable to the Federal estate tax. In commenting upon this case the United States Circuit Court of Appeals for the Second Circuit, in *Keith* v. *Johnson, supra,* decided on November 21, 1924, said:

> "That case turned on the meaning of section 203 (a) (1) of the Act of 1916, especially the words 'such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.' It is quite true that the reason given was that inheritance taxes were 'taxes on the right of individual beneficiaries,' and for that reason not 'charges that affect the estate as a whole.' Literally the first clause quoted contradicts *U. S.* v. *Perkins, supra,* but the cases may be reconciled by understanding that the 'charges' intended are only such as are imposed on the executor as successor *stricti juris.* like the income tax itself, and not such as arise because he must distribute the estate, as is the inheritance tax. There was reason to impute such a distinction to Congress, since the income tax is collected yearly, while the inheritance tax is levied once and for all. Both sovereigns might well insist upon an exaction on the whole estate for the privilege of its transfer."

We are of the opinion that the decision of the United States Supreme Court in *New York Trust Company* v. *Eisner, supra,* is not controlling in the appeal at bar. Cf. *Appeal of Farmers Loan & Trust Co.,* 3 B. T. A. [p. 3578 above].

PHILLIPS concurring in the result, only.

U. S. BOARD OF TAX APPEALS.

Docket No. 3847.

Appeal of MAY S. YOUNG, Executrix of the Estate of DAVID G. LEGGETT, *Deceased*.

The New York transfer tax is deductible from the income of an estate in the year in which the tax is paid.

Submitted July 9, 1925. Decided Dec. 1, 1925.

RUSSELL L. BRADFORD, ESQ., for the taxpayer. E. C. LAKE, ESQ., for the Commissioner.

Before MARQUETTE and MORRIS.

This appeal is from the determination of a deficiency in income tax for the period from April 27, 1923, to December 31, 1923, inclusive, in the amount of $222,958.15.

Two questions are raised, (1) whether the amount of $800,000 paid by the executrix to the State of New York as a transfer tax, is deductible from the income received by the executrix and (2) whether the amounts of rentals and bond interest which had accrued during the lifetime of the decedent, and were included within the gross estate of the decedent for Federal estate tax purposes, but were actually paid to the executrix, should be included within the income of the executrix.

FINDINGS OF FACT.

The taxpayer is the duly nominated and appointed executrix under the will of David G. Leggett, who at the date of his decease was a resident of New York.

Leggett died on April 27, 1923, leaving real and personal property within the State of New York having a gross value of $21,104,336.84, subject to deductions for New York transfer tax purposes of $1,056,567.66, or a net estate subject to New York transfer tax of $20,047,769.18. Leggett left real estate within the State of New York of a value of $2,710,400, which, by the ninth clause

of his will, he specifically devised to his nephew, David G. Leggett, and his niece, Mary S. Young. Leggett left no real estate within the State of New York which was not specifically devised as aforesaid.

The executrix, on or about October 24, 1923, paid to the State of New York, on account of transfer tax against the estate of Leggett, the sum of $800,000, which constituted a partial payment in advance.

By the fifth clause of his will, Leggett specifically bequeathed to J. deR. Whitehouse certain jewelry of the value of $750, and by the ninth clause of his will, he specifically bequeathed to David G. Leggett, the nephew, certain personal effects of a value of $28,046.55, the value of total specific bequests subject to tax being $28,796.55.

Leggett made no other specific bequests of personalty, except one to Vera Whitehouse of certain jewelry of the value of $500, which bequest was not subject to the New York transfer tax.

The executrix rendered a personal income tax return for the decedent covering the period from January 1, 1923, to April 27, 1923, and made a return as executrix for the period from April 27, 1923, to and including December 31, 1923. Both returns were made upon a cash receipts and disbursements basis.

In rendering her return as executrix, the taxpayer excluded from the report of total income the sum of $11,822.67, which represented rentals accrued to the date of the death of the decedent but not collected until after his death, which accrued rentals were included in the Federal estate tax return as capital. The executrix also excluded from the report of total income the amount of $33,609.80, which represented interest on bonds which had accrued to the date of the death of the decedent but were not collected until after the death, which accrued interest she also included as capital in the Federal estate tax return and in the New York transfer tax return.

The Commissioner included within the income re-

ported by the executrix for the period from April 27, 1923, to December 31, 1923, said amounts of $11,822.67 and $33,609.80, disallowed the deduction of the $800,000 paid to the State of New York as the transfer tax, and determined the net income of the executrix to be $639,627.22, with a resulting deficiency in tax of $222,958.15.

DECISION.

The deficiency determined by the Commissioner is disallowed.

OPINION.

MARQUETTE: That the New York transfer tax, paid during 1923, is deductible from the gross income of the estate for that period was decided in *Appeal of Farmers Loan & Trust Co.*, 3 B. T. A. [p. 3578, above]; *Appeal of Edgar Munson*, 3 B. T. A. [p. 3643, above], and *Appeal of Joanna Lovett*, 3 B. T. A. [p. 3654, above]. Upon the authority of those decisions, the deficiency must be disallowed.

Since the deduction of $800,000 exceeds the entire net income of the estate for the period in 1923, it is unnecessary for us to decide the other questions presented for our consideration.

U. S. BOARD OF TAX APPEALS.

Docket No. 2940.

Appeal of Joanna Lovett, Executrix of the Estate of Thomas J. Lovett, *Deceased.*

During 1923 taxpayer estate paid a New York State transfer tax of $5,650.29 and claimed that amount as a deduction in its Federal income tax returns for that year. The deduction was allowed upon the authority of *Appeals of Farmers Loan & Trust Co.* and *Edgar Munson* [p. 3578 and 3643, *supra.*]—[Ed.].

Submitted July 1, 1925. Decided Dec. 1, 1925.

B. G. Simpich, Esq., for the Commissioner.

Before James, Littleton, Smith and Trussell.

This is an appeal from the determination of a deficiency in income tax for the year 1923 in the amount of $288.19. The sole issue is whether the New York State transfer tax is deductible by an estate in determining taxable net income.

Findings of Fact.

Thomas J. Lovett died a resident of the City of Buffalo, N. Y., prior to the year 1923, and Joanna Lovett was duly appointed executrix of his estate. During the year 1923 the executrix filed a New York State transfer tax return upon which was assessed a transfer tax of $5,650.29, which tax was paid by her in the year 1923. In making the income tax return for the estate for that year, the executrix deducted, as tax paid by the estate, the said amount of $5,650.29, and the Commissioner in the audit of the said return disallowed the said deduction and assessed the deficiency here in issue.

Decision.

The deficiency determined by the Commissioner is disallowed. ***Appeal of Farmers Loan & Trust Co.*, 3 B. T. A. [p. 3578, above]; *Appeal of Edgar Munson*, 3 B. T. A. [p. 3643, above].**

IN THE

Supreme Court of the United States

October Term, 1925.

No. 295

HENRY P. KEITH, Late Collector of United States Internal Revenue, for the First Collection District of New York,

Petitioner,

vs.

EMMA B. JOHNSON, Administratrix of the goods, chattels and credits which were of John G. Johnson, Deceased,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of C. Alexander Capron, Russell L. Bradford, Walter F. Taylor and John M. Perry, as *Amici Curiae.*

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AUTHORITIES CITED.

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Respondent.

BRIEF OF AMICI CURIAE

Through the courtesy of counsel in the above entitled cause, and by the indulgence of this Court, permission to file this brief as *amici curiae* has been given to C. Alexander Capron, Russell L. Bradford, Walter F. Taylor and John M. Perry, who appear as counsel in pending causes which will be directly affected by the decision of this Court in this cause.

Statement

This action was brought in the United States District Court for the Eastern District of New York to recover income taxes paid by the Administratrix of the goods, chattels and credits, which were of John G. Johnson, deceased, upon the income of the estate for the period beginning March 24, 1917, the date of death, and ending December 31, 1917, under the provisions of the Revenue Act of 1916, as amended by the Revenue Act of 1917. By stipulation of the parties (R. Page 17) the only question presented for the decision of the Court was whether the transfer tax paid to the State of New York is such tax as should properly have been allowed as a deduction in computing the net income for the period for which the return was filed.

Judgment in favor of the defendant was entered by the District Court on the 26th day of September 1923 (Record, Page 9). It was affirmed by the Circuit Court of Appeals for the Second Circuit on the 28th day of November 1924, (Record, Page 20). The cause comes before this Court on Certiorari to the United States Circuit Court of Appeals for the Second Circuit, (Record, Page 21), 267 U. S. 590.

The Issue

The sole question for decision is: Was the New York Transfer Tax paid by the Administratrix in the period for which the return was filed, an allowable deduction in ascertaining the net income of the estate subject to the Federal Income Tax for that period?

ARGUMENT.

Introduction.

The Income Tax Act of 1913 contained no express provision taxing the income of estates or trusts. The Treasury Department maintained, however, that the income of estates or trusts was nevertheless taxable against the executor or trustee and attempted to collect taxes thereon. Its right to do so was contested and was denied by this Court in *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602. Accordingly, in the Revenue Act of 1916, Congress inserted a provision making the income of estates and certain trusts taxable and requiring that the tax be paid by the executor or the trustee (Sec. 216). The validity of this provision was upheld in *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509.

Congress might, we suppose, have provided that the income of estates and certain trusts should be taxed to the person who received the benefit, but it adopted the more simple method of declaring the estate or trust to be a tax entity and taxing it upon the income which it received, regardless of the fact that some beneficiary was the ultimate, although not the immediate, recipient of the bounty.

Section 5 (a) (3) of the Revenue Act of 1916 as amended by Section 1201 of the Revenue Act of 1917, provided that in computing net income subject to the Federal Income Tax there shall be allowed as a deduction:

> "Taxes paid within the year imposed by the authority of the United States, (except income and excess profits taxes), or its Territories, or possessions, or any foreign country, *or by the authority of any state*, county, school district, municipality, or other taxing subdivision of any state, *not including those assessed against local benefits.*" (italics ours)

The Government concedes that the New York Transfer Tax is a deductible tax under the provisions of the Act quoted above. The issue is raised as to who may make the deduction, the Administratrix who was required by statute to file the return for the Federal Income and the New York Transfer Taxes, against whom both taxes were assessed, who was personally liable for and who paid both taxes, or the beneficiaries of the estate.

In approaching the question, it is important to bear in mind that the duties of the Administratrix were to collect the assets, convert them into cash, pay the decedent's debts, pay the Federal Estate Tax and the New York Transfer Tax, make a return to the United States and to the State of New York of the income collected during the settlement of the estate, and pay the tax thereon,—then distribute the remaining cash to the next of kin. Further, it is important that the provisions of the New York Transfer Tax Law made the Administratrix personally liable for the payment of the tax (Sec. 224), provided that she should not be entitled to a discharge until the tax was paid (Sec. 236), expressly directed that from any distribution in cash she should deduct and pay to the State Tax Commission the amount of the tax, and in case of a distribution in kind authorized her to sell sufficient of the property to pay the tax (Sec. 224). It is true that the statute makes the tax a lien upon the property transferred and makes the beneficiary liable for it if he receives property upon the transfer of which the tax has not been paid. It is submitted, however, that the tax primarily was imposed upon and was payable by the Administratrix as the representative of the estate in process of settlement. If that be so, there can be no basis for the Government's contention,—for the most that is required as a condition to the deduction is that the tax was "imposed upon" and "paid by" the entity which must pay the Federal Income Tax.

POINT I.

THIS COURT DENIED AN APPLICATION FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS, 2nd CIRCUIT, WHICH HELD THAT THE NEW YORK TRANSFER TAX IS NOT DEDUCTIBLE BY THE BENEFICIARIES.

Since the passage of the first Income Tax Law, various aspects of the general question here presented have been under consideration in the Federal Internal Revenue Department and in the Courts. The question was first presented in the Courts in the case of *Prentiss* v. *Eisner*, 260 Fed. Rep. 589, where a legatee under a will sued to recover Federal Income Taxes resulting from the disallowances of a deduction taken in her return for a portion of the New York Transfer Tax, which had been paid by the Executors of the Will under which she received her legacy.

The Circuit Court of Appeals on reviewing and affirming the decision of the District Court, 267 Fed. Rep. 16, held that the New York Transfer Tax Act, under which the tax is a lien on the estate payable by the Executor or Administrator, is a tax on the right to transmit property in general, not a tax payable by the legatee and, therefore, no deduction for the payment of such tax could be made in the income tax return of the legatee.

Application for a Writ of Certiorari to review this decision was made to this Court and denied (254 U. S. 647).

So that we may take it this Court has held, if in the administration of the estate which is the subject of the present appeal, the beneficiaries of the estate had in their income tax returns sought to take advantage of a deduction of any part of the amount paid to the State of New

York for Transfer Tax, such action on their part would be contrary to the decision of this Court. In the course of its opinion in *Prentiss* v. *Eisner*, the Circuit Court of Appeals said on page 21:

> "Now a succession tax is a tax upon a transfer of property in general, and as such is distinguishable from a legacy duty, which is a tax upon a specific bequest. Under the New York law the succession tax creates a lien upon the estate of the decedent at the moment of his death. The right of the state to the amount of this lien attaches at that time, and it must be paid before the transferee, legatee, or devisee ever gets anything, and the executor or administrator is personally liable for the tax until it has been paid. * * * *
>
> The fact, however, remains that if a legacy left by a will is $10,000, and the executor has paid to the state on its account a tax of $500, and then has turned over to the legatee $9,500, the legatee has received, not $10,000, but $9,500, and the legatee has been enriched only to the extent of the amount which he has himself received, and he has not paid the tax, nor has it been paid by his authority, nor by any one representing him. The payment has been made by the personal representative of the deceased, and in making it he has acted under authority of the statute."

The Government here contends that the New York Transfer Tax is deductible by the beneficiaries of the estate. No explanation is made why it is not foreclosed from doing so by the decision in this case.

In each of the following cases a similar contention has been overruled.

Prentiss v. *Eisner* (supra).

Keith v. *Johnson*, 294 Fed. 964 (D. C. E. D., N. Y.).

Keith v. *Johnson*, 3 Fed. (2nd) 361 (C. C. A. 2d Cir.).

Farmers Loan & Trust Co. v. *United States. Corporation Trust Company Income Tax Service*, 1925 p. 1082 (D. C., S. D., N. Y.).

Appeal of *Farmers Loan & Trust Co.*

3 Commerce Clearing House, U. S. Board of Tax Appeals Service, p. 3578.

Appeal of *Munson*,

3 Commerce Clearing House, U. S. Board of Tax Appeals Service, p. 3643.

Appeal of *Young*,

3 Commerce Clearing House, U. S. Board of Tax Appeals Service, p. 3650.

POINT II.

THE NEW YORK TRANSFER TAX PAID BY THE ADMINISTRATRIX IN THE PERIOD FOR WHICH THE RETURN WAS FILED IS AN ALLOWABLE DEDUCTION IN ASCERTAINING THE NET INCOME OF THE ESTATE FOR THAT PERIOD REPORTED FOR PURPOSES OF FEDERAL INCOME TAX, UNDER THE DECISION OF THIS COURT IN *UNITED STATES* v. *WOODWARD*, AND THE DECISION OF THE COURT OF APPEALS OF NEW YORK IN *PEOPLE EX REL. HOME TRUST CO.* v. *LAW*.

In *United States* v. *Woodward*, 256 U. S. 632, this Court decided that the Federal Estate Tax paid by the Executors in that case and claimed by them as a deduction in their income tax return for the year 1918 was an allowable deduction in ascertaining the net taxable income of that estate for that year.

It is the contention of the respondent that the intrinsic nature and purpose of the New York Transfer

Tax is the same as that of the Federal Estate Tax and that, therefore, the reasoning of this Court in the Woodward case applies to the question presented by the record in this case and sustains the contention of the respondent.

In the *Woodward case* this Court said, on page 633:

> "The sole question for decision is, was the estate tax paid by the executors and claimed by them as a deduction in the income tax return for the year 1918, an allowable deduction in ascertaining the net taxable income of the estate for that year? * * *
>
> "The solution of the question turns entirely upon the statutory provisions under which the two taxes were severally collected. The Act of 1918, by Sections 210, 211 and 219 subject the net income 'received by estates of deceased persons during the period of administration or settlement' to an income tax. . . . Section 214 makes express provision for the deduction of 'taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war profits and excess profits taxes'. This last provision is the important one here. It is not ambiguous but explicit, and leaves little room for construction. The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones particularly excepted. Indeed, the same act, by Sections 400-410, expressly provides for their continued imposition and enforcement. Thus their omission from the excepting clause means that Congress did not intend to except them."

Section 1201 of the Act of 1917 (which, so far as consideration of the question here presented is concerned, is identical with Section 214 of the Act of 1918 referred to in the *Woodward* decision) makes express provision for the deduction of "taxes paid within the year imposed by the authority of the United States (except income and excess profit taxes) or of its territories or possessions, or of any foreign country or *by the authority of any state, county, school district, or municipality or other taxing subdivisions of any state, not including those assessed against local benefits.*"

What was said of Section 214, in the foregoing quotation from the opinion in the *Woodward* case, is equally applicable to Section 1201 as to Transfer and Inheritance Taxes of the various states, which were, at the time of the passage of the Act, well known; the statute in New York, for instance, having been in existence since about the year 1885.

In view of the decision in the *Woodward* case, and of the wording of the statute under consideration, permitting the same deductibility of taxes which are imposed by the authority of any state that is permitted when taxes are imposed by the authority of the United States, is there any legal distinction between the question presented by the case at bar and the question decided in the *Woodward* case?

The New York Courts following the decision in the *Woodward* case have permitted Executors, in determining the amount of income subject to the tax imposed by the New York Income Tax Act, which in all material respects, is identical with the Federal Income Tax Act, to deduct the Transfer Tax imposed by the New York law, on the ground that the intrinsic nature and purpose of the Federal Estate Tax and the New York Transfer Tax are the same.

It was so decided in the *Matter of Application of Home Trust Company as Executor of Andrew Carnegie*

v. *Law*, 204 A. D. 590, affirmed by the Court of Appeals in 236 N. Y. 607. There was no opinion written in this case by the Court of Appeals, but the opinion of the lower Court, accompanied its judgment which was affirmed by the Court of Appeals. In that opinion in referring to the State Income Tax it was said at page 591:

> "The tax thus laid is patterned after the Federal tax imposed upon the net income of individuals. (Revenue Act of 1918, Section 210). That tax was made applicable to estates of deceased persons and is imposed upon the net income of such estates during the process of administration or settlement. (Revenue Act of 1918, Section 219.) Moreover the tax deductions authorized to be made in calculating annual net income are substantially the same under both the Federal and State Law. . . . If, therefore, the tax imposed by Section 220 of the Tax Law upon 'taxable transfers' and the Federal 'estate tax' are taxes of an identical or similar nature, we have in the case of *United States* v. *Woodward* (supra), a very definite precedent for drawing the conclusion that a transfer tax, paid by an executor under the laws of this state during a given year, is deductible from the gross income of the estate for the year, in order to determine the State Income Tax due from the estate in that year. . . .
>
> There are variances between the two laws" (I. E. Federal Estate Tax Law and the New York State Tax Law) "in respect to the rates charged, the exemptions permitted, the deductions authorized, as well as in other particulars. *However, the intrinsic nature and purpose of the tax is the same in either case.* Therefore, it seems to me that since the one tax is deductible from gross revenue to determine the taxable net income of an estate under the Federal law, the other tax should be held to be deductible to determine the taxable net income of an estate under the State law. . . .
>
> "Aside from authority and theory we think it was the clear legislative intent, as indicated by the various provisions of the Tax law" (STATE TAX

LAW) "that in calculating the net income of the estate of a decedent for income tax purposes, the amount paid by an executor during the year in satisfaction of a Transfer Tax should be deducted. *The income tax payment is made by the executor of the estate from funds of the estate and not from funds belonging to legatees.* (*Kings County Trust Company* v. *Law*, 201 App. Div. 181). *The transfer tax payment is made by the executor from the funds of the estate.* 'The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time.' * * * *Thus the tax is measurable not by the funds received by a legatee, but by the funds the executor receives.* As the burden of paying the income tax, as well as the burden of paying the transfer tax is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax law measurable by gross income received less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself pays." (Italics supplied.)

In view of this decision of the Court of the State of New York construing the New York State Transfer Tax as identical in nature and purpose with the Federal Estate Tax and in view of the fact that the Federal statute grants equal deductibility to Federal and State Taxes, and in view of the fact that the Supreme Court has held, in the circumstances, the Federal Tax is deductible, it is submitted that there is no sound legal ground for the contention that the State Transfer Tax is not also deductible.

This Court had no difficulty in reaching the conclusion that the Federal Estate Tax, which constitutes a lien upon the property and is a liability against the beneficiary as well as against the executor, was a tax imposed upon the estate, although, of course, the ultimate burden falls upon the beneficiaries, or some of

them. This Court did not interest itself in the niceties of the situation and did not concern itself with technicalities. It perceived that Congress had expressly provided that an estate should be deeemd a taxable entity and that the executor should pay a tax upon the income received by the estate regardless of its ultimate destination, and that Congress had also provided that taxable entities, estates as well as individuals, should be allowed to deduct all taxes paid by them other than income taxes, excess profits taxes, and taxes assessed for local benefits. It concluded that a tax imposed on account of the transfer of property from the decedent to the beneficiary and payable by the executor out of the funds in his hands necessarily came within the deductions contemplated by Congress.

Undoubtedly, the reason that in the *Woodward* case the language of this Court is not more apposite upon the point that the tax is deductible by the estate as distinguished from the beneficiary, is that the Government did not suggest that there was any such alternative and did not attempt to say that the deduction should be allowed to the beneficiary and not to the estate. The argument of the Government was that the Federal Estate Tax was not a tax at all, but was in the nature of an escheat to the United States.

In the *Home Trust Company* case the New York Court of Appeals, in construing the New York Income Tax, which, it is we think admitted, was a copy of the original Federal statute and was in all material respects identical with the Federal statute involved in the case at bar, held that under the provision permitting the deduction of taxes, the New York Transfer Tax, being a tax payable on account of the right of a decedent to transmit his property, and being payable by the executor out of funds in his hands, was deductible by the estate. The New York Court in that case, like this Court in the *Woodward* case, indulged in no consideration of technicalities and fine-spun distinctions which could not have

been in the mind of the Legislature when it provided for the deduction of taxes. The underlying thought which prompted the decision is expressed in the single sentence:

> "As the burden of paying the income tax, as well as the burden of paying the transfer tax is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax Law measurable by gross income received less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself paid."

The decision of the Circuit Court of Appeals in the case at bar was based on the same fundamental point. Thus, Judge Learned Hand, after calling attention to the provisions of sections 2 and 5 of the Revenue Act of 1916, said (3 Fed. 2nd. 361):

> "As section 2 (b) assesses the tax against the executor personally, he is the 'citizen or resident' of section 5 who may deduct the state tax. The case at bar therefore turns on whether the New York inheritance tax is 'imposed' on him. At least, if it is so imposed, section 5 covers him. That is a question of New York law, and we are bound by the decisions of the New York Court of Appeals on that question.
>
> The New York inheritance tax is imposed by section 220 of the Tax Law (Consol. Laws N. Y. c. 60) on 'the transfer of property.' This is ambiguous in respect of its incidents, but section 224 enacts that the tax shall be 'a lien upon the property transferred . . . and the executors . . . of every estate so transferred shall be personally liable for such tax until its payment.' We think that in principle under this provision the tax is 'imposed' on the executor, and that it was so ruled in *Home Trust Co. v. Law*, 204 App. Div. 590, 198 N. Y. S. 710, affirmed in 236 N. Y. 607, 142 N. E. 303."

The only conceivable reason why the New York Transfer Tax might be deductible by the beneficiaries rather than by the estate is that the ultimate burden of the tax falls upon the beneficiaries. But this is not a good reason for such a conclusion. In the first place, the same thing is true of the Federal Estate Tax, for, obviously, the persons who are ultimately out of pocket are the residuary beneficiaries, and it has been held that this is no reason for denying the deduction to the estate. In the second place, the suggestion confuses the incidence of the tax with the impact of the tax. The question is not "Who bears the ultimate burden?" but "Upon whom is the tax imposed?" The distinction is one well known to the economists. Professor Seligman has written a book on the "Incidence of Taxation", on page 2 of which he says:

> "The impact of a tax is therefore the immediate result of the imposition of a tax on the person who pays it in the first instance. . . . We thus have the three distinct conceptions—the impact, the shifting, and the incidence of a tax, which correspond respectively to the imposition, the transfer, and the settling, or coming to rest, of the tax. The impact is the initial phenomenon, the shifting is the intermediate process, the incidence is the result. To confuse the impact with the incidence is as reprehensible as to confound the incidence with the shifting."

If the incidence of a tax is to be the test of deductibility, every taxpayer will require the advice of an economist in making up his income tax return.

In the third place, the Congressional intent that the estate shall pay a tax upon the income received by it and that it may deduct taxes paid by it are reciprocal. In making the estate pay a tax upon the income, Congress was not bothered by the fact that the estate did not get the ultimate benefit of the income so received, but that

the true beneficial recipients were the beneficiaries. By the same token it is to be presumed that it was no part of its intent that the right to deduct taxes paid by the estate should depend upon the question of who ultimately bears the burden, so long as the tax is imposed upon the estate.

Finally, it is to be noticed that to say that the New York Transfer Tax is deductible by the beneficiaries and not by the estate would lead to utterly illogical results. So long as the transfer tax is deductible only by the estate, it is substantially deductible only from the income from the property on account of the transfer of which the tax is paid. But if the transfer tax is deductible by the beneficiaries, it will serve as an offset against income derived not only from the property transferred, but from other sources.

From the point of view of the income tax, the legatee, as such, has no relation to the decedent's estate. The legacy he receives is not subject to the income tax.

The income which the estate receives is by the express terms of the statute made subject to the income tax.

It it reasonable to suppose that when Congress permitted the deduction of "taxes" from gross income to ascertain the net income which was subject to income tax, it contemplated the entity which received the income and was liable for its payment, rather than one who was in no wise liable for income tax on that which he received.

There are, of course, differences between the Federal Estate Tax and the New York Transfer Tax. They are pointed out in the opinion of the Court in the *Home Trust Company* case (204 N. Y. App. Div. 590) and found to be insufficient to furnish the basis for a distinction as to deductibility. We shall not examine the differences in detail, for there is no basis for the assumption that such differences in detail were thought by Congress to require a different rule of deductibility.

To summarize: The New York Legislature imposed a tax upon the transfer of the property of a decedent and thereunder, as was said in the *Home Trust Company* case, "the burden of paying the transfer tax is cast upon the executor" and the "payment is made by the executor from the funds of the estate." Congress enacted that the estate of a decedent should constitute a taxable entity and that the executor should pay an income tax upon the income received by the estate. Congress further provided that a taxpayer might deduct from gross income taxes paid within the year imposed by the United States or a State. This Court held in the *Woodward* case that Congress thereby expressed an intention that the Federal Estate Tax should be deducted from the gross income of an estate. The New York Court of Appeals held in the *Home Trust Company* case that the New York Transfer Tax and the Federal Estate Tax "are taxes of an identical or similar nature" and that "the intrinsic nature and purpose of the tax is the same in either case." The Circuit Court of Appeals for the Second Circuit held that the New York Transfer Tax might *not* be deducted from the gross income of the *beneficiary* of an estate,—and this Court refused to review the decision. It is admitted that the New York Transfer Tax is deductible either by the estate or by the beneficiaries of the estate. Why should the Treasury Department attempt to deny the deduction to the estate which is the respondent here?

POINT III.

THERE IS NO MERIT IN THE GOVERNMENT'S ARGUMENT THAT THE QUESTION NOW PRESENTED HAS ALREADY BEEN DECIDED IN ITS FAVOR BY THIS COURT.

The Government now throws aside all the theories previously advanced and for the first time it stands flatly upon the proposition that this Court has already decided the question in *New York Trust Company* v. *Eisner* —a case in which the question was not and could not have been presented.

The Government, as we have said, admits that the New York Transfer Tax is deductible either by the estate or by the beneficiaries. It advances only a single argument why it is not deductible by the estate. That argument is based upon three propositions:

(1) In the *Woodward* case this Court held that there may be deducted by an estate for purposes of the Federal Income Tax only such taxes as are "charges against the estate" and "are paid by the personal representative substantially as other taxes are paid."

(2) In the *New York Trust Company* case, this Court held that the New York Transfer Tax is not a "charge against the estate".

(3) The New York Transfer Tax is not "paid by the personal representative substantially as other taxes are paid" because it is paid out of the particular shares after those shares have been determined.

Unless the Government can sustain the first proposition and either the second or the third proposition, it virtually concedes the soundness of our case. We shall examine the correctness of each of these propositions separately.

(1) *This Court did not decide in the Woodward case that there may be deducted* **only** *such taxes as are "charges against the estate" and "are paid by the personal representative substantially as other taxes are paid."*

The *Woodward* case, it will be remembered, involved the question of the right of an estate to deduct the Federal Estate Tax for purposes of the Federal Income Tax. The argument of the Government was not, as here, that no deduction should be allowed to the estate because under the statute it is allowed to the beneficiary, but on the contrary, that the Federal Estate Tax was not deductible by any one because it was not a tax at all within the meaning of the statute. The Government's theory was that immediately upon the death the proportion of the estate fixed by the statute was instantly set aside in trust for the United States, and that upon the expiration of the year at the end of which the statute required the payment, the United States became entitled to the property so set aside as an escheat, and when the executor paid the Collector of Internal Revenue he was merely transferring to the United States the property which had escheated to it under the statute. It was in answer to this argument that this Court used the language upon which the Government now relies. In indicating why it considered that the payment required by the statute was a tax, it said that the payment was a charge against the estate, thereby differentiating it from an escheat. It said that the payment is made "by the personal representative substantially as other taxes are paid" without detailed analysis of the fund from which it was required to be paid or inquiry as to the ultimate burden of the payment, and it intended to express thereby its opinion that so far as the method of payment prescribed by the statute was concerned, there was, in a broad sense, no reason to

differentiate it from other taxes payable by individuals, estates or trusts.

The Government seizes upon those words as used to point out a particular and fundamental distinction between the payment required by the statute as the court conceived of it, and the payment required by the statute as the Government attempted to represent it, in a case in which it held that the payment was a proper deduction, and it attempts to construe them into a limitation—a pronouncement that only such taxes as are "charges against the estate" and as "are paid by the personal representative substantially as other taxes are paid" may be deducted. We think we are right in saying that nothing was further from the mind of this Court.

The vice in the Government's argument lies in saying that the words there used are to be given the same meaning as somewhat similar words used by this Court in the *New York Trust Company* case in connection with an entirely different question.

(2) *The language used in the opinion in the New York Trust Company case that the New York Transfer Tax is not a "charge against the estate" within the meaning of the Federal Estate Tax and that for purposes of the Federal Estate Tax it is only charges against the estate as a whole which may be deducted, have no bearing upon the present question; namely, whether the New York Transfer Tax is a tax imposed upon the estate so as to be deductible under the Federal Income Tax, by the estate rather than by the beneficiaries.*

The New York Trust Company v. *Eisner*, 256 U. S. 345, involved, first, the question of the constitutionality of the Federal Estate Tax and, second, the question of whether the New York Transfer Tax was deductible in determining the value of the net estate subject to the Federal Estate Tax under the provision permitting the

deduction of funeral expenses, administration expenses, claims against the estate, mortgages, losses and "such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered." It was held that the Federal Estate Tax was constitutional and that the statute did not permit the deduction of the New York Transfer Tax.

So far as the decision itself is concerned, it could scarcely be argued that it forecloses the question whether the New York Transfer Tax is such a tax as may be deducted by an estate under the provision of the Federal Income Tax permitting the deduction of taxes imposed upon the estate. On the constitutional point the taxpayer had argued that the Federal Estate Tax infringed upon the rights of the States to regulate the transmission of property from the dead to the living, because it attached at the moment of death and instantly took out of the estate sufficient property to pay the tax. But on the point of the deductibility of the New York Transfer Tax, the taxpayer argued that the New York Transfer Tax should come first and be deducted from the net estate upon which the Federal tax was to be computed. In answering this argument, this Court said (256 U. S. 349):

> "There remains only the construction of the act. The argument against its constitutionality is based upon a premise that is unfavorable to the contention of the plaintiffs in error upon this point. For if the tax attaches to the estate before distribution—if it is a tax on the right to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. 'Charges against the estate' as pointed out by the Court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. This reasoning excludes not only

> the New York succession tax but those paid to other States, which can stand no better than that paid in New York. What amount New York may take as the basis of taxation and questions of priority between the United States and the State are not open in this case."

Obviously in meeting this argument on the construction of a statute which did not include "taxes" as a deduction the Court was not considering the question now presented, and this is emphasized by the fact that within a month after the decision of the New York Trust Company case this Court by unanimous decision decided the *Woodward* case where the definition of "taxes" was essential and where the result was that to which we have already alluded.

The truth of the matter is that the argument which the Government is now making never could have been made if the opinion in the *Woodward* case had not, in holding the Federal Estate Tax deductible, referred to it as a "charge against the estate." The argument is nothing but a play on words. When words are used in totally different connections, they are very apt to have totally different meanings. Mr. Justice Holmes, in *Towne* v. *Eisner*, 245 U. S. 418, expressed the thought in a sentence which will become a classic:

> "But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

(3) *The fact that the amount of the individual shares of each beneficiary is determined without first deducting from the entire estate the amount of the New York Transfer Tax has nothing to do with the question of deductibility by the estate.*

The third proposition in the Government's argument, whereby it seeks to prove that the decisions of this Court shall be that the New York transfer tax is not deductible for purposes of the Federal income tax, is that the transfer tax is not paid "substantially as other taxes are paid" and that therefore it does not come within the limitation which the Government says was laid down in the *Woodward* case. The reason which the Government gives in support of the statement that the New York Transfer Tax is not paid "substantially as other taxes are paid" is that "it is paid out of the particular shares after these shares have been determined". The same thought is expressed in the Government's brief as follows:

> "The intention is that the tax *must reduce* the assets of the estate available for distribution, and that so long as the estate is entitled to reimbursement, as it is under the New York law, it is not, in theory or in practice, reduced by the payment."
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> * * * * * * *
>
> "But it is incongruous to say that a tax is imposed upon an estate before distribution when the estate before distribution is not reduced by the payment of the tax."

What the Government means is explained in the examples given in Appendix C of its brief. Its meaning is that the executor, instead of first determining the amount of the tax to be paid and deducting that from all of the assets in his hands and then allocating those assets in accordance with the will or the statute of distributions, first determines the distribution of the assets as if there

were no transfer tax to pay. But this, of course, has no significance except to show that the method of determining the amount of the New York tax is to first determine the amount which each beneficiary gets rather than the total amount distributable among all the beneficiaries. This distinction is immaterial upon the question whether the tax is imposed upon the estate. In either event, it must be paid out of the assets in the hands of the executor. The controlling factor in determining whether the tax is imposed upon the estate within the intent of Congress, is whether it is required to be paid by the executor out of some funds coming into his hands, and the Government does not attempt to deny that this is the fact.

These things were material in the *New York Trust Company* case because the question there was whether the New York Transfer Tax was a liability existing before the moment of the impact of the Federal Estate Tax, and they went to prove that that was not the case. The argument of the Government, therefore, only tends to prove that the New York Transfer Tax is not deductible for purposes of determining the net estate subject to the Federal Estate Tax, which is a totally different question from the question involved in the case at bar, namely, whether the tax is one imposed upon the estate so as to come within the class of taxes which Congress permitted to be deducted by the estate in determining its taxable net income.

We shall not refer to the New York or United States Supreme Court cases cited on pages 14 to 18 of the Government's brief, further than to say that in none of them was there any issue as to the question which is in issue in the case at bar, and that even if some of the language of the court may conceivably seem to be inconsistent with our conception of the nature of the New York Transfer Tax, it must be borne in mind that the language was used loosely and without reference to the point which is in

issue here. (See *Appeal of Farmers Loan & Trust Co.*, 3 Commerce Clearing House, U. S. Board of Tax Appeals Service, p. 3578.) In only one New York case, and in only one United States Supreme Court case, has that point been material. The New York case is the *Home Trust Company* case, where it was held that the New York Transfer Tax is precisely the same in effect, for purposes of what is substantially the issue here, as the Federal Estate Tax. The United States Supreme Court case is *Prentiss* v. *Eisner* where the Circuit Court of Appeals held, and this Court refused to reconsider, that the nature of the New York Transfer Tax is such that under the Federal Income Tax it is not deductible from the income of the beneficiaries of an estate, thereby rendering it necessary to accept the alternative that it is deductible by the estate.

It may be well to mention that there are two minor details upon the basis of which the Government attempts to draw a distinction between the Federal Estate Tax and the New York Transfer Tax for purposes of the present question.

The first is that, if a gift to a beneficiary is not in money, the "executor is required to collect the tax thereon from the person entitled thereto and he cannot be compelled to deliver the property until the beneficiary has paid the tax thereon." This provision is contained in section 224. The purpose of this provision is apparently to render possible what otherwise would not have been possible, namely, the delivery to the beneficiary of the specific property distributable to him. Without such a provision, it would, under the other provisions of the statute, have been necessary for the executor to sell the property, which might be an heirloom or a painting, and thus deprive the beneficiary of the very thing which the decedent wished him to have or that the beneficiary desired. The other provision referred to by the Government is that permitting a refund to the beneficiary,

if debts discovered after the distribution require the repayment by the beneficiary of part of the property distributed to him. This is contained in section 225 and it will be noticed that the refund is made to the executor, unless the tax has actually been advanced by the beneficiary, which is of course a rare case.

At the very end of the Government's brief, the argument is made that, so far as the New York Transfer Tax is imposed on real estate, it ought not to be deductible by the estate because the real estate vested immediately in the beneficiaries and never became a part of the estate in the hands of the executor. It is then argued that since it would be very difficult to separate the tax on real estate from the tax on personalty, no part of the tax should be deducted. However, we do not admit that there is any difference between the tax upon real estate or specifically bequeathed property and the tax upon the administration of personal property. In each case in which the question has been presented either the Court or the Board of Tax Appeals has held that the tax is of the same character and that it is deductible from the income of the estate. But, assuming that such a distinction can be made—which we do not admit—the basis for that distinction is not present in the case in suit. (See cases cited on pages 6 and 7.)

The whole argument of the Government proceeds upon the misconception that the New York Transfer Tax may not be deducted for purposes of the Federal Income Tax, if it may not be deducted for purposes of the Federal Estate Tax.

POINT IV.

EVEN IF IT BE ERRONEOUSLY ASSUMED THAT IN THE *NEW YORK TRUST COMPANY* CASE THIS COURT REACHED THE CONCLUSION THAT THE NATURE OF THE NEW YORK TRANSFER TAX IS SUCH THAT IT IS NOT DEDUCTIBLE BY AN ESTATE FOR PURPOSES OF THE FEDERAL INCOME TAX, THIS CONCLUSION WILL BE RECONSIDERED IN THE LIGHT OF WHAT THE NEW YORK COURT OF APPEALS SUBSEQUENTLY DECIDED IN THE *HOME TRUST COMPANY* CASE.

We do not for one moment believe that this Court in the *New York Trust Co.* case reached or expressed any conclusion with respect to the nature of the New York Transfer Tax which is either controlling or persuasive in connection with the question before it in this case. It merely held that the Federal Estate Tax and the New York Transfer Tax were of equal dignity, and that both attached at the moment of death (as to New York Transfer Tax see *Matter of Hubbard*, 234 N. Y. 175, and see *New York Trust Co.* v. *Eisner* as to Federal Estate Tax, and that neither came before, or was deductible from, the other, see also *Stebbins* v. *Riley*, 268 U. S. 137, and *Frick* v. *Pennsylvania*, 45 S. Ct. 603. If, however, we are wrong, and such a conclusion was reached or expressed, there can be no doubt that the subsequent decision of the New York Court of Appeals construing the New York Transfer Tax furnishes a reason for the reconsideration of such a conclusion. It is true, of course, that the fundamental question in the present case is the construction of the provision in section 5(a) of the Revenue Act of 1916 permitting the deduction by a taxpayer of taxes paid within the year. In construing that provision, this Court is not

required to follow anything that a State court may have said. But, since the ultimate purpose sought in construing this provision is to determine whether the New York Transfer Tax is of such a nature that it comes within the intent which Congress expressed in that provision, the decision of the New York Court of Appeals in the first case involving the nature of the New York Transfer Tax for purposes of the general question here involved, will be accorded great weight, if it be not regarded as conclusive. It is clear on both principle and authority that, although a State statute may have been construed by this Court, it will change its construction to conform to that of the State Court announced in decisions subsequent to the first decision of this Court.

In *Fairfield* v. *County*, 100 U. S. 47, this Court said:

> "We recognize the importance of the rule *stare decisis*. We recognize also the other rule, that this court will follow the decisions of State courts, giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made, or purchases in reliance upon them. *And it has been held that this court will abandon its former decision construing a State statute, if the State courts have subsequently given to it a different construction.* In *Green* v. *Neal's Lessee* (6 Pet. 291), the question raised was whether the court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the State court. In two previous cases a certain construction had been given to a statute of Tennessee in supposed harmony with decisions of the State court. But subsequently it was decided otherwise by the State Supreme Court; and it appeared that the decisions upon which this court had relied were made under peculiar circumstances, and were never in the State considered as fully settling the construction of the act. *This court, therefore, overruled its former two decisions, and followed the later con-*

struction adopted by the State court. See also *Suydam* v. *Williamson*, 24 How. 427."

In *Green* v. *Neal's Lessee*, mentioned in the foregoing quotation, this court said (at p. 298):

> "It is admitted in the argument, that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the State shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. . . .
>
> If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should by construction, give a different effect to a statute, from what had at first been given to it. . . The inquiry is, what is the settled law of the State at the time the decision is made. This constitutes the rule of property within the State, by which the rights of litigant parties must be determined."

For decisions of Federal appellate courts, reversing decisions of lower Federal courts because of State decisions rendered while the case was on appeal, see *Metzger Company* v. *Parrott*, 233 U. S. 36; *Fleischman* v. *Burns*, 284 Fed. 358.

The Government cites *Carroll County* v. *Smith*, 111 U. S. 556, as laying down a contrary rule, but the following quotation from the opinion makes it clear that it does not do so, save under very peculiar facts, which do not exist in the case at bar (p. 562):

"The decision in *Hawkins* v. *Carroll County*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a federal tribunal. *Burgess* v. *Seligman*, 107 U. S. 20, 33."

The point is particularly pertinent if we assume the correctness of the Government's argument that this Court has construed section 5(a) of the Revenue Act of 1916 to permit the deduction by an estate only of such taxes as constitute "charges against the estate", for it can hardly be disputed that in the *Home Trust Company* case, the New York court construed the New York Transfer Tax to be a "charge against the estate" when it said that "the burden of paying the transfer tax is cast upon the executor" and the "payment is made by the executor from the funds of the estate."

CONCLUSION.

For the reasons stated, the judgment in favor of the defendant should be affirmed.

Respectfully submitted,

C. Alexander Capron
Russell L. Bradford
Walter F. Taylor, and
John M. Perry
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 295.—October Term, 1925.

Henry P. Keith, Late Collector of United States Internal Revenue, Petitioner, *vs.* Emma B. Johnson, as Administratrix.	Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 12, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

In 1917, John B. Johnson, a resident of New York, died intestate. Respondent was appointed administratrix, and in that year paid to the State $233,044.20, the transfer tax imposed pursuant to Art. X, Tax Law, c. 60, Consolidated Laws. When respondent made the income tax return for the estate for 1917 (Revenue Act of 1916, c. 463, 39 Stat. 756, 757), she claimed that the state transfer tax paid in that year was deductible; but, yielding to the regulations of the Treasury Department, she did not make the deduction, and under protest paid to the United States an income tax calculated on $164,958.00, amounting to $30,985.53. If the deduction had been made there would have been no taxable income. This action was brought to recover the amount paid. The District Court gave respondent judgment which was affirmed by the Circuit Court of Appeals.

Under the Revenue Act of 1916, the income of the estate for 1917 during administration was subject to a tax to be assessed against the administratrix. She was required to pay the tax and was indemnified against claims of beneficiaries for the amount paid. § 2(b). It is provided that in computing net income, in the case of a citizen or resident of the United States, for the purpose of the tax there shall be allowed as deductions the taxes imposed by the authority of the United States or of any State and paid within the year. § 5(a) Third. Administrators and other

fiduciaries are subject to all the provisions which apply to individuals. § 8(c).

In *United States* v. *Woodward*, 256 U. S. 632, it was held that the federal estate taxes imposed by the Revenue Act of 1916 are deductible in ascertaining net taxable income received by estates of deceased persons during the period of administration or settlement. Revenue Act of 1918, Title II. The court said (p. 635): "It [the estate tax] is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. . . . It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for purposes of administration, . . . but is made a general charge on the gross estate and is to be paid in money out of any available funds or, if there be none, by converting other property into money for the purpose."

The government contends that the state transfer tax is not imposed on the estate and is not deductible in calculating the federal tax on the income of the estate.

The transfer tax law imposes a tax "upon the transfer of property" from the deceased (§ 220) at rates graduated, according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. §§ 221, 221(a). Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. § 224.* They are not entitled to discharge

**Lien of tax and collection by executors, administrators and trustees.* Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as

until the tax is paid. § 236. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But, by whomsoever the amount may be handed over to the State, the tax is in effect an appropriation by the State of a part of the property of the deceased at the time of death. And the State's portion is deductible from the legacy and does not pass to the legatee. If money is transferred the tax is withheld; property other than money passes subject to the transfer tax. Cf. *Matter of Estate of Swift*, 137 N. Y. 77, 83. In *Matter of Merriam*, 141 N. Y. 479, a bequest to the United States was held subject to the tax. The court said (p. 484), "This tax, in effect, limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed upon the succession of property. This view eliminates from the case the point urged by the appellant that to collect this tax would be in violation of the well-established rule that the state cannot tax the property of the United States. Assuming this legacy vested in the United States at the moment of testator's death, yet in contemplation of law the tax was fixed on the succession at the same instant of time. This is not a tax imposed by the state on the property of the United States. The property that vests in the United States under this will is the net amount of its legacy after the succession tax is paid." That case was brought to this court on writ of error.

herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

United States v. *Perkins*, 163 U. S. 625. Following the decisions of the New York court it was held that the transfer tax is not imposed on property but on the transfer, and that the property does not pass to the heirs or legatees until, by the enforced contribution to the State, it has suffered diminution to the amount of the tax. And see *Prentiss* v. *Eisner*, 260 Fed. 589, affirmed, 267 Fed. 16; *People* v. *Fraser*, 145 N. Y. 593, affirming 74 Hun. 282.

The government cites *New York Trust Co.* v. *Eisner*, 256 U. S. 345. In that case there was involved the amount of the federal estate tax under § 201 of the Revenue Act of 1916, 39 Stat. 756, 777. Section 203 provided that there should be deducted from the value of the gross estate funeral expenses, administration expenses, claims against the estate, certain losses, "and such other charges against the estate as are allowed by the laws of the jurisdiction" where the estate was administered. When that case was before this court the latest decision of the New York Court of Appeals, having a direct bearing upon the matter, was *Matter of Gihon*, 169 N. Y. 443. It was there held that the state transfer tax was the same as the federal inheritance tax imposed by the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, which was considered by this court in *Knowlton* v. *Moore*, 178 U. S. 41; that the tax was not primarily payable out of the estate; that it was a tax not upon property but upon succession; "that is to say, a tax on the legatee for the privilege of succeeding to property", and that payment of the tax by the personal representative was for the legatee and not on account of the estate. In harmony with that case this court held that the state transfer tax paid by the executors was not deductible in calculating the amount of the federal estate tax. Since then the courts of New York, notwithstanding the *Gihon* case, have construed the statute in harmony with the earlier decisions of the New York courts and *United States* v. *Perkins, supra.*

In *Home Trust Company* v. *Law*, 204 App. Div. 590, the court considered the state law which imposes an income tax on individuals (Tax Law, § 351), and makes that tax applicable to income of estates of deceased persons received during administration. § 365. It is shown that the state income tax and deductions (§ 360) from gross earnings, authorized to be made to determine the amount of the taxable income of the estate, are

patterned after the corresponding federal taxes and deductions; and, following the decision of this court in *United States* v. *Woodward, supra,* it was held that, since the federal estate tax paid is deductible to arrive at the income of the estate subject to the federal tax, the state transfer tax should be held to be deductible in ascertaining the income of the estate taxable under the state law. The court said (p. 594), "Aside from authority and theory we think it was the clear legislative intent, as indicated by the various provisions of the Tax Law, that in calculating the net income of the estate of a decedent for income tax purposes, the amount paid by an executor during the year in satisfaction of a transfer tax should be deducted. The income tax payment is made by the executor of the estate from funds of the estate and not from funds belonging to legatees. (*Kings County Trust Company* v. *Law,* 201 App. Div. 181.) The transfer tax payment is made by the executor from the funds of the estate. 'The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time.' (*Matter of Hubbard,* 234 N. Y. 179.) Thus the tax is measurable not by the funds received by a legatee, but by the funds the executor receives. As the burden of paying the income tax, as well as the burden of paying the transfer tax, is cast upon the executor, and as the taxable income of the estate is under the terms of the Tax Law measurable by gross income received less taxes paid, it would seem clear that the person paying the income tax, namely, the executor, is entitled to deduct the very transfer tax which he himself pays." This decision was affirmed by the Court of Appeals without opinion. 236 N. Y. 607. This court will follow the decisions of the state courts as to the meaning and proper application of the state transfer tax law, any expressions in its earlier decision to the contrary notwithstanding. *Green* v. *Lessee of Neal,* 6 Pet. 291, 298, 299; *Fairfield* v. *County of Gallatin,* 100 U. S. 47; *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, 464.

By indicating that the latest decisions of the state courts will be followed here as binding, it is not intended to intimate that a different view is entertained as to the construction properly to be given the state law. In fact we agree with that construction; and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a State where

there has been no authoritative construction by the state courts. Compare *Harrigan* v. *Bergdoll*, No. 181, decided this day. And we are of opinion that the transfer tax is deductible. It was primarily payable by the respondent out of moneys and other property of the estate; and it was so paid by her. While this lessens the amount for distribution among the heirs, it cannot be said that they bore any part of that tax. As well might it be claimed that they paid the funeral expenses and debts, if any, of the intestate. No part of the transfer tax so paid could be taken by the heirs as a deduction in calculating their federal income taxes. It follows that the amount of the transfer tax paid in 1917 by the respondent was deductible in ascertaining the taxable income of the estate received by her in that year.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.